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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 509

TRANSCONTINENTAL & WESTERN AIR, INC.,
PETITIONER,

vs.

JOSEPH H. KOPPAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FILED DECEMBER 18, 1952.

CERTIORARI GRANTED FEBRUARY 9, 1953

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the U.S.D.C., Western Missouri	1	1
Complaint	1	1
Answer	20	19
Interrogatories to defendant and motion to produce	22	20
Answers to interrogatories to defendant and motion to produce	27	23
Plaintiff's interrogatories to defendant	32	26
Answers to plaintiff's interrogatories to defendant	35	28
Pre-trial order of the District Court	38	29
Exhibits:		
Plaintiff's Exhibit "A"—Agreement effective March 22, 1949, between Transcontinental & Western Air, Inc., and The Mechanics and related employees in the service of said Company as represented by International Association of Machinists	41	31
Defendant's Exhibit 1—Letter dated November 9, 1949 from Leslie D. Myers, Manager of Overhaul to J. H. Koppal	42	88
Defendant's Exhibit 2—Communication dated November 11, 1949 from J. H. Koppal to L. D. Myers	43	89
Defendant's Exhibit 3—Employee's notification of absence	44	90

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 1, 1952.

	Original	Print
Record from the U.S.D.C., Western Missouri—Continued		
Narrative of evidence	45	90
Testimony of Betty Koppal	45	90
Joseph H. Koppal	49	93
Motion for directed verdict and action thereon	60	101
Note re defendant's testimony	61	102
Motion for directed verdict and action thereon	62	102
Plaintiff's requested instructions	63	103
Court's charge to jury	65	104
Colloquy between Court and counsel	82	116
Verdict	85	118
Defendant's motion to have the verdict and judgment set aside and to have judgment entered in accordance with its motion for a directed verdict and motion for new trial	86	118
Order sustaining motion for judgment notwithstanding verdict and for new trial	90	120
Notice of appeal	92	121
Appellant's designation of record	93	121
Appellee's designation of record	95	123
Order on motion for directed verdict and for a new trial	97	124
Filings—Proceedings	105	130
Appellee's supplement to record	109	132
Narrative of evidence	109	132
Testimony of Betty Koppal	109	132
Joseph Koppal	110	133
Leslie Myers	134	149
Charles E. Bowman	138	152
Merle Hicklin	138	152
Joseph L. Wilson	139	152
Edward Huff	141	154
Carl G. Johnson	148	159
C. F. Woodling	149	159
Edna L. Swink	149	160
Defendant's trial brief	151	161
Proceedings in the U.S.C.A., ~~Ninth~~ Eighth Circuit	153	162
Appearances	153	162
Order of submission	154	163
Opinion, Johnsen, J.	155	164
Concurring opinion, Colet, J.	169	175
Dissenting opinion, Riddick, J.	169	175
Judgment	175	180
Petition for rehearing (omitted in printing)	176	
Order denying petition for rehearing	188	181
Motion for stay of issuance of mandate	188	181
Order staying issuance of mandate	190	182
Clerk's certificate (omitted in printing)	191	
Order allowing certiorari	192	183

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

JOSEPH H. KOPPAL, Plaintiff,

vs.

TRANSCONTINENTAL AND WESTERN AIR, INC., a corporation, Defendant

Civil Case No. 6434

(Plaintiff demands a trial by jury)

COMPLAINT—Filed June 30, 1950

Comes now the plaintiff, and for his cause of action, complains and states as follows:

1. The jurisdiction of this Court is founded upon the provisions of the Railway Labor Act of the United States, Title 45 USCA Sections 151-188, and because the plaintiff is a resident of the State of Kansas, the defendant a resident of the State of Delaware, and the amount in controversy exceeds $3,000.00 exclusive of interests and costs.

2. Plaintiff states that at all times mentioned herein the defendant was a Delaware corporation and a common carrier by air engaged in inter-state and foreign commerce, and operated its airlines, offices and shops in Kansas City, Missouri, within the Western Division of the Western District of the District Court of this United States for the State of Missouri.

[fol. 2] 3. Plaintiff further states that he is a resident of the State of Kansas, and that on or about the 8th day of November, 1949, and for many years prior thereto, he was employed by the defendant as a master mechanic in its engine department, and that on said date his status as an employee of the defendant was governed by the terms of an agreement between Transcontinental And Western Air, Inc., the defendant herein, and the International Association of Machinists, hereinafter referred to as "said agree-

ment," which Association was and is the legally designated collective bargaining representative for the class of employees to which plaintiff belonged, and that the effective date of said agreement was March 22, 1949, plaintiff further states that on the 8th day of November, 1949, he was not a member of the International Association of Machinists, nor a party to the aforesaid agreement; that on said date the relationship of the employer and employee between the plaintiff and the defendant was governed by and was subject to the provisions of the Railway Labor Act (45 USCA Sections 151-188), and that although plaintiff was not a member of said International Association of Machinists, the terms and conditions of his employment were governed by the aforesaid agreement by and through the operation of the aforesaid Railway Labor Act. Plaintiff further states that according to the terms and provisions of said agreement there are certain seniority, job and employment rights vested in him, of which he could not be deprived by the defendant without just cause or reason, due process of law, and compliance with the terms of said agreement. The [fol. 3] particular terms and provisions of said agreement which vest seniority, job and employment rights in this plaintiff were and are as follows:

Article VI

Seniority

(a) *Definitions:*

(1) *System seniority* shall be defined as the length of service for which an employee receives credit, regardless of location, in any of the classifications covered by this Agreement, with this Company or any of its predecessors. The definition of system seniority shall include ability to perform the required work of the job in a satisfactory manner, and except as hereinafter provided shall accrue from the date of entering a classification on a regular assignment. System seniority shall be applicable only to the mechanical classifications and only to Mechanics and higher within the mechanical classifications.

(2) *Point seniority* shall be defined as the length of service for which an employee receives credit in a

classification covered by this Agreement, at a point, and shall be superior to system seniority in making all determinations. The definition of point seniority shall include ability to perform the required work of the job in a satisfactory manner, and except as hereinafter provided, shall accrue from the date of entering a classification at a point on a regular assignment.

(b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

(c) *Probationary Employees:*

Employees will be considered as probationary employees for the first ninety (90) days of their employment, and there shall be no responsibility on the part of the Company for the reemployment of probationary employees if they are discharged or laid off during this period. [fol. 4] If retained after the probationary period, the names of such employees shall then be placed on the appropriate seniority list as of their date of hire.

(d) *Seniority Lists:*

(1) Seniority lists, corrected to December 1 and June 1 and prepared by the Company, shall be furnished each Local Committee and the General Chairman for the Union, and shall be posted on bulletin boards at each point on or before January 1 and July 1 each year. Errors of omission and typographical errors will be corrected currently with a copy furnished the General Chairman. Effective with the posting of July, 1948, seniority lists, protest of seniority dates for correction of dates or for addition or deletion of names shall be open for a period of thirty (30) days from date of posting. All subsequent seniority lists shall be open to protest for a period of fifteen (15) days from date of posting, but if the seniority date on a list is not protested within the prescribed time limit

after the initial appearance of a name on a list, such date shall stand as correct and official on all subsequent lists. Any employee on leave, on special assignment, in a laid-off status, on vacation, or on sick or injured absence at the time of posting shall have a period of fifteen (15) days from the date of his return to service to file a protest, or the balance of the original correction period, whichever is greater. Except as hereinafter provided in paragraphs (3), (4), (5), and (6) below, if two (2) or more employees within a classification have the same seniority date, their names will appear on the seniority list in alphabetical order.

(2) The classes or crafts covered by this Agreement will be grouped into four (4) general groups as set forth below, with a separate seniority list for each classification within a group, and for the purpose of computing and applying seniority, it is understood that all Company operations within any city or metropolitan area shall be considered as one point, except at Kansas City, where two (2) points will continue to be recognized for employees in Group No. 2:

Group No. 1	*Group No. 2*
Lead Inspector	Receiving Inspector
[fol. 5] Inspector	Lead Stores Clerk
Lead Mechanic	Stores Clerk
Mechanic	
Mechanic Helper	
Lead Ground Service Helper	
Ground Service Helper	
Lead Fleet Service Helper	
Fleet Service Helper	
Lead Janitor	
Janitor	

Group No. 3	*Group No. 4*
Lead Commissary Clerk	Lead Cargo Agent
Commissary Clerk	Cargo Agent
Commissary Helper	

(3) Employees covered by this Agreement who were classified as Mechanic, Senior Mechanic, Master Mechanic, Lead Mechanic, Inspector, or Lead Inspector

on January 1, 1946, shall be credited with continuous seniority as a Mechanic from the date their name first appeared on the Company payroll as a Mechanic or higher classified employee. This seniority date shall be both their system seniority date and their point seniority date as a Mechanic on all future rosters, unless an individual has changed point location since February 16, 1946, in which case the point seniority date will be the date of transfer to the new point.

(4) Employees covered by this Agreement who were classified as Lead Inspector, Inspector, or Lead Mechanic on May 15, 1946, shall be credited with actual days worked within the respective classifications prior to February 16, 1946, and shall be credited with continuous seniority within the respective classifications from the date their name again appeared on the Company payroll in the classification on a job not identified as "temporary" or "acting." If two or more mechanics have entered the classification of Lead Mechanic or Inspector on the same date, they will be listed on the seniority list for the higher classification in the same order as shown on the Mechanic list. This seniority date shall be both their system and point seniority date within the respective classifications on all future rosters, unless an individual has changed point location since February 16, 1946, in which [fol. 6] case the point seniority date will be the date of transfer to the new point.

(5) Employees reclassified from Apprentice Mechanic or Junior Mechanic during the year 1946 shall continue to have a seniority date of January 1, 1946, as a Mechanic on all future seniority rosters in the same order as indicated on the 1947 seniority lists, unless an individual has changed point location since January 1, 1946, in which case the point seniority date will be the date of transfer.

(6) Employees who were classified as Apprentice Mechanics at the time of entering the military or naval service of the United States prior to January 1, 1946, upon return to Company employment under the provisions of paragraph (f), Article XIII, if subsequently

reclassified to Mechanic, shall be granted a seniority date of January 1, 1946, as a Mechanic. This seniority date will not govern the pay status of such employees and upon reclassification they will start at the minimum hourly rate of a Mechanic, and thereafter be subject to automatic progression based on actual time spent in the classification. Mechanic Helper Trainees in the service of the Company on December 31, 1948, including those Trainees in active service and Trainees in laid-off status, will be classified as Mechanic on and after January 1, 1949. After reclassification to Mechanic, Trainees in the active service of the Company on January 1, 1949, will be permitted to work one (1) day as a Mechanic to establish seniority and then laid off if jobs are not available to which their seniority will entitle them.

(7) No seniority credit shall be transferred from one (1) of the above Groups to another under any conditions, and all accrued seniority within a group shall be canceled for an employee accepting transfer to another group covered by this Agreement. The seniority status of an employee shall not be affected, however, if during a period of actual lay-off from a group, as a result of force reduction, he accepts employment within another group, unless he refuses to return, in order of seniority, when the force is again increased within his original group and classification.

[fol. 7] (e) *Loss of Seniority:*

An employee will lose his seniority status and his name will be removed from the seniority lists under the following conditions:

(1) He quits or resigns.

(2) He is discharged for just cause.

(3) He does not inform the Company in writing or by telegraph of his intention to return to service within seven (7) days of receipt of a notice offering to re-employ him after a lay-off.

(4) He does not return to the service on or before a date specified in the notice from the Company after

a lay-off, which date shall be not prior to fifteen (15) days after sending such notice; provided that subdivisions (3) and (4) of this paragraph (e) shall not apply to offers of temporary work. Any notice provided for in this paragraph (e) shall be sent by Registered Mail (return receipt requested) or telegram to the employee at the last address filed by him with the Industrial Relations Department.

(5) He is absent three (3) consecutive work days without notifying the Company, unless satisfactory reason is given.

(6) He fails to return to work at the end of an authorized leave of absence.

(7) He engages in gainful employment while on leave of absence in violation of Article XIII(e).

(8) He is laid off and does not return to work for a period of two and one-half years after lay-off.

(f) *Loss of Classification Seniority:*

(1) Where employees at a point are accruing seniority in lower classifications at the same point and are affected by a reduction in force, they shall be required to immediately exercise their seniority in the highest classification their seniority will permit. [fol. 8] Failure to exercise seniority within a classification will cause loss of seniority in the classification.

(2) Any Lead Inspector, Inspector, or Lead Mechanic laid off in a reduction in force at a point and accruing seniority in lower classifications at another point will be required to exercise his seniority in the highest possible classification within ten (10) days after actual lay-off or his name will be stricken from the seniority list of the lower classifications in the order of refusal to exercise seniority.

(3) Any employee reduced from a classification due to a reduction in force and refusing to accept the first job open in the higher classification for which he is qualified at the point where reduced shall have his name removed from the seniority list for that classification at the point.

(g) *Reduction and Increase of Working Force:*

(1) Whenever the number of employees in any classification is reduced, the reduction shall be by classifications according to point seniority, and the employee with least seniority in the classification will be the first laid off. An employee displaced because of a reduction in force may exercise point seniority in placing himself on the shift of his choice in any job for which he is qualified. In the event an employee is not qualified for any classification, he shall be laid off.

(2) Ten (10) work days' notice or pay therefor, at the Company's option, will be given employees affected before a reduction is made, and a list of those to be laid off will be furnished the Local Shop Committee and the System General Chairman. Where there is temporarily no work because of an Act of God, circumstances over which the Company has no control, or work stoppages and strikes by employees of the Company, it shall not be considered a normal reduction in force and subject to this provision.

(3) In the restoration of forces, seniority will apply in the reverse order, the senior qualified laid-off employee in the classification to be returned first. Employees laid off in a force reduction will accrue all classification seniority but shall only accrue service credit for pay purposes up to a maximum of thirty [fol. 9] (30) calendar days after date of lay-off.

(4) It shall be the responsibility of each employee to file with the Industrial Relations Department of the Company and with the System General Chairman of the Union a complete record of his qualifications for use in making proper determinations of an employee's ability in the future exercise of seniority.

(5) In case of demotion due to reduction in force, the employee demoted shall continue to accrue point seniority in the classification from which demoted.

(6) When, due to a seniority displacement, a change in an individual's days off, vacation periods, or shift becomes necessary, no notice will be required. Likewise, in the event an employee is to be laid off as a

result of a senior employee exercising his seniority in bumping back, no notice will be required to the employee affected.

(7) An employee reduced from a classification shall not continue to accrue service for pay purposes in the higher classification from which reduced, but upon return to the higher classification will be paid not less than the hourly rate applicable for previously accrued service.

(8) Employees laid off on account of a reduction in force will be given preference in accordance with system seniority at other points on the system where vacancies exist for which they are qualified, provided that such employees make application therefor, at the time of lay-off, with the privilege of returning to their home station when the force is increased and they are entitled to be recalled. Any such transfers shall be made without expense to the Company, but free non-positive air transportation will be granted the employee and dependent members of his family within the continental limits of the United States, to the extent permitted by law.

(h) *General:*

(1) Employees accepting temporary transfers to such jobs as may be agreed upon by the Company and the Union for a period not to exceed three (3) months or any extension thereof that may be agreed [fol. 10] upon, and employees accepting promotion to actual supervisory positions will continue to accrue seniority in the classification at the point from which transferred or promoted.

(2) When an employee goes to a higher classification within a Group, he shall continue to accrue point seniority in the lower classification at the point from which promoted. This shall not apply to employees in classifications below Mechanic in Group No. 1.

(3) Mechanic seniority will govern in determining successful bidders for Lead Mechanic or Inspector. Inspector seniority will govern in moving into the Lead Inspector classification and when Inspectors are not

available, Mechanic seniority shall govern. Lower classifications in Group No. 1 will be governed by the same policy, i.e., Ground Service Helper seniority will govern in the selection of Lead Ground Service Helper; Fleet Service Helper seniority will govern in the selection of Lead Fleet Service Helper; and Janitor seniority will govern in the selection of Lead Janitor.

(4) The same principle of seniority in moving from a lower to a higher classification in Groups No. 2, No. 3, and No. 4 will be applied as set forth in paragraph (h) (3) above to govern classifications below that of Mechanic.

(5) When an employee moves to a higher classification under the terms of this Agreement to fill a temporary or bulletined job, he shall continue to accrue seniority in the lower classification at the point from which promoted, and in case of subsequent demotion from a bulletined job due to reduction in force, he shall continue to accrue point seniority in the classification at the point where demoted.

(6) Point seniority shall apply in the selection of shifts and days off within a classification within a department. It may be exercised only in case of bumping due to a reduction in force or when an opening occurs. In preparing days off and shift schedules, the Company will determine how many employees are needed on a shift and the determination will be based on the type of work needed and the classification.

[fol. 11] (i) *Geographical Relocation:*

In the event of the geographical relocation in whole or in part of any of the work performed by employees covered by this Agreement, the employees affected will be given an opportunity to transfer to the new location at Company expense in accordance with the policy as set forth in the Policy and Procedure Manual and given full credit for their accumulated classification seniority at the point to which the work is transferred in whole or in part. It is understood that the increase or expansion of facilities at a particular point that does not involve a reduction in jobs

or facilities at another point shall not be construed as a geographical relocation of work in whole or in part.

Article XV

Free Transportation

(a) Employees covered by this Agreement will be granted the same transportation privileges on the Company system as may be established by Company regulations for all comparable personnel.

(b) The System General Chairman of the Union will be furnished with transportation over the Company system within the Continental limits of the United States during his term of office for use in connection with his work to the extent permitted by law.

(c) Employees laid off by the Company in a reduction of force who desire to seek employment elsewhere will, upon application, be granted on one occasion free, one-way, non-positive air transportation on the Company's planes to any point on the system within the continental limits of the United States, to the extent permitted by law.

Article XVI

Vacations

(a) Employees will be eligible for annual paid vacations based on the number of months worked during the preceding calendar year and in accordance with the regulations hereinafter set forth.

[fol. 12] (b) *Vacation Allotment Schedule*

(1) The vacation year shall be from January 1 to December 31.

(2) Paid vacation allowance will be computed on scheduled work days and based on the number of months worked in the preceding calendar year in accordance with the schedule below:

Less than 14 Years' Service

Months of Service Prior to January 1	*Vacation Allowance Work Days*
1	1
2	2
3	3
4	4
5	4
6	5
7	6
8	7
9	8
10	9
11	9
12	10

All employees hereunder who prior to January 1, have completed fourteen (14) or more years of active service with the Company shall be eligible for an additional five (5) work days of vacation with pay during each calendar year thereafter, in accordance with the provisions of this Article. Vacation allowance for any such employee who is on pay status for less than twelve (12) calendar months in the preceding calendar year will be credited in accordance with the following schedule:

14 Years' or More Service

Months of Service Prior to January 1	*Vacation Allowance Work Days*
1	2
2	3
3	4
4	5
[fol. 13] 5	6
6	8
7	9
8	10

14 Years' or More Service

Months of Service Prior to January 1	*Vacation Allowance Work Days*
9	11
10	13
11	14
12	15

The maximum vacation allowance in no case will exceed fifteen (15) work days.

(c) Vacation allowance will accrue during each calendar month for which an employee receives pay for eighty-five (85) or more straight time hours from the Company, whether he is working or is on sick leave or vacation. An employee loaned to another company will accrue vacation credit during such loan period.

(d) An employee who has been with the Company at least one (1) year on January 1 may take his vacation at any time during the calendar year in which the vacation is due, subject to departmental vacation schedules and approval of his supervisor.

(e) An employee who has been with the Company less than one (1) year as of January 1 will be entitled to vacation with pay after January 1, computed in accordance with the schedule in (b) (2) above. However, in no case will a vacation be allowed to an employee until he has completed six (6) months of service with the Company.

(f) Compensation for the vacation period shall be computed at the employee's base rate of pay (including premium pay) in effect at the time the vacation is taken.

(g) If a holiday recognized in Article VIII (d) occurs during the employee's vacation period, he shall be paid at straight time for the day, in addition to his vacation period.

[fol. 14] (h) Vacation leave is not cumulative and must be taken during the year following the year in which vacation is accrued, unless an employee has received written request from his supervisor to forego his vacation during the year. Otherwise, if not taken within the calendar year when eligible, his vacation will be forfeited.

(i) An employee temporarily terminating because of lay-off due to reduction in force or an employee granted a leave of absence shall be given vacation pay based on the number of months worked in the preceding year in accordance with paragraph (b) (2), if vacation has not been taken in the current calendar year. Such employees shall also be paid vacation credit for the period worked during the current calendar year in accordance with the schedule set forth in paragraph (b) (2).

(j) An employee who is discharged or who resigns shall be paid for vacation due him, based on the number of months worked in the preceding year, in accordance with paragraph (b) (2), if vacation has not been taken during the current calendar year. Employees discharged for cause or resigning without giving at least two (2) calendar weeks' written notice shall not be paid vacation credit for any months worked in the current year.

(k) If an employee received written request from his supervisor to forego his vacation during a previous year and has not yet received that vacation, vacation pay will be paid for that year upon termination, regardless of reason for termination.

(l) An employee recalled from lay-off or returning from leave of absence will accrue vacation leave from the date of return to service in accordance with paragraph (b) (2), which vacation leave may be taken in the next calendar year.

(m) In the case of the death of an employee, any vacation pay allowance due him shall be paid to the executor, administrator, or legal heir.

(n) Request for vacation leave will be granted on a basis of seniority at the point. However, a senior employee will not be permitted to take vacation leave already assigned to a junior employee.

[fol. 15] (o) A list indicating the number and classification of employees who may be on vacation at any given time during the year must be posted at each point by November 5 of each year. The Company will endeavor to schedule vacations during desirable periods to the extent such scheduling is permitted by operational requirements. Employees will have up to November 25 to choose vacation

periods, and by December 5 vacation lists will be posted at each point. Employees shall be given their vacation pay prior to taking their vacation, if they request the same by written notification to the appropriate Cost Accounting Department not less than two (2) weeks prior to the start of the vacation. Not more than eight (8) per cent of the employees at a point will be required to take a vacation during either January or February.

Article VXII

Sick Leave

(a) Employees who have completed six months of continuous service may be granted sick leave with pay according to the amount of sick leave allowance accrued at time of sickness.

(b) Sick leave allowance will accrue to employees at the rate of one (1) day for each month of continuous service and may accumulate to a maximum of sixty (60) work days if sickness does not require its use as accrued.

(c) Employees will not be eligible for sick leave benefits during the first six months of continuous service; however, sick leave credit will accrue during that period.

(d) Sick leave pay shall be at the employee's current straight-time rate.

(e) After a sickness, the number of days paid for will be charged against the allowance, and one (1) day of each month of continuous service shall again accrue to the employee until the accumulation again reaches sixty (60) days.

(f) Employees during the first three (3) years of employment shall not receive any sick leave pay for the first three (3) days of each illness.

(g) Employees will be required to present confirmation [fol. 16] of sickness upon return to work, and the Company reserves the right to require a physician's certificate to confirm any sick claim in excess of three (3) days.

(h) It is the responsibility of any employee absent from work because of sickness to report immediately such absence and the reason therefor to his immediate superior, or to the office or person designated by the Company.

(i) Sick leave allowance will accrue during each calendar month for which an employee receives pay for eighty-five (85) or more straight time house, whether he is working or is on sick leave or vacation.

(j) The employees covered by this Agreement, and the Union, recognize an obligation to be truthful and honest and to prevent unnecessary absences and other abuses of sick leave privileges.

Article XVIII

Longevity

(a) All employees covered by this agreement will receive, for each year of completed employment spent in any of the classifications covered by this Agreement exclusive of the first three (3) years of employment, longevity of one (1) cent an hour for each year of continuous employment, to a maximum of ten (10) cents. The maximum of ten (10) cents will thus be reached at the end of thirteen (13) years of employment.

(b) Employees who now receive ten (10) cents or more longevity under former longevity plans will retain their longevity and will accrue no more.

(c) Employees presently receiving less than ten (10) cents longevity will retain their present longevity but will accrue no more until the scale in (a) above catches up. Thereafter, they will receive longevity based on the provisions of paragraph (a) of this article.

(d) Longevity accrued in any classification will be retained upon transfer or promotion to another classification. For the purpose of computing longevity credit, only pay seniority shall be counted.

[fol. 17]

Article XX

Insurance Benefits

The present group sick and accident insurance plan, hospitalization plan, and any insurance benefits as in effect on the date of this Agreement shall not be altered or changed to the extent of decreasing the benefits or increasing the rate without conferring with the Union at least fifteen (15) days prior to the date of change.

4. Plaintiff further states that Article XI, section (b) (10) of the aforesaid agreement, which was in full force and effect in November, 1949, provided that an investigation and fair hearing must be given to all employees with more than ninety days' service with the defendant before such employee could be discharged from the service of the defendant, and that said hearing should be held before a representative of the defendant other than the one bringing the complaint against such an employee; that said Article further provided that the employee should be notified in writing of the precise charge against him and be given a reasonable opportunity to secure the presence of necessary witnesses at such a hearing. The provisions of Article XI, section (b) (10) are as follows:

> "No employee who has been in the service of the Company ninety (90) days or more shall be discharged without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee. Suspension from the service of the Company pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised, in writing, of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. If a stenographic report of the investigation is taken, the Union Committee or representative will be furnished a copy. A written decision will be issued within five (5) work days after [fol. 18] the close of such hearing. If the decision is not satisfactory, then appeal may be made in accordance with the procedure prescribed in Step 3."

5. Plaintiff further states that on or about November 12, 1949 plaintiff was wrongfully and unlawfully discharged from the service of the defendant for an alleged violation of the sick leave rule set forth in paragraph 3 above; that plaintiff was discharged without a fair hearing, that he was not notified in writing of the precise charge against him, and that he was not given a reasonable opportunity to secure the presence of witnesses at a hearing prior to

the time of his discharge. At such a hearing the plaintiff could and would have produced witnesses in his behalf and at which hearing the plaintiff could have proved that he was not guilty of the alleged violation of the sick leave rule; and that as a direct and proximate result of the wrongful acts and misrepresentations of the defendant, the plaintiff was deprived and defrauded by the defendant of his employment, seniority rights, pension rights, and other property rights under the aforesaid agreement between the defendant and the International Association of Machinists.

6. Plaintiff states that as a direct and proximate result of the wrongful and tortuous acts of the defendant as aforesaid, he has been unlawfully deprived of his employment, seniority rights and other property rights under the agreement as set forth in paragraph 3 above; that he has been caused to suffer much mental anguish and has been unable to secure other employment, all to his damage in the sum [fol. 19] of Seven Thousand Five Hundred ($7,500.00) Dollars.

7. Plaintiff further states that his discharge by the defendant was wilful, fraudulent, malicious, wrongful, and without legal justification or excuse, and that the defendant was actuated by malice, spite and ill will towards the plaintiff, and plaintiff asks that defendant be punished therefor in the amount of Fifteen Thousand ($15,000.00) Dollars.

Wherefore, Plaintiff Prays for actual damages in the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, and for punitive damages in the sum of Fifteen Thousand ($15,000.00) Dollars, or for a total of Twenty-two Thousand Five Hundred ($22,500.00) Dollars, and for his costs herein.

Fred J. Freel, Ray D. Jones, Jr., Attorneys for Plaintiff, 900 Bryant Building, Kansas City, Missouri, HArrison 3632.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 14, 1950

Comes now defendant and for its answer to plaintiff's complaint states:

1. Defendant admits the averments of paragraphs 1, 2, 3 and 4 of said complaint, except the averments that plaintiff is a resident of the State of Kansas and that he was not a member of the International Association of Machinists. Defendant is without knowledge concerning plaintiff's place of residence and his membership or non-membership in the International Association of Machinists.

2. Defendant denies the averments of paragraphs 5, 6 and 7 of said complaint.

3. Further answering said complaint, defendant states that on November 9, 1949, plaintiff was suspended for abusing the sick leave provision of the contract referred to in said complaint, and was notified that he would be given a hearing on November 11, 1949 in accordance with the provisions of said contract; that he was given a hearing on said date, as provided by said contract, and that at the conclusion of said hearing plaintiff resigned from the service of the defendant.

Wherefore, having fully answered, defendant prays to be discharged with its costs.

Ruby D. Garrett, Garrett & Ruark, Attorneys for Defendant, 822 Scarritt Bldg., Vi. 0750, Kansas City, Missouri.

[fol. 21] Received copy hereof this *14th* day of August, 1950.

Fred J. Freel, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

INTERROGATORIES TO DEFENDANT AND MOTION TO PRODUCE—
Filed August 29, 1950

Comes now the plaintiff, under Rules 33 and 34 of the Federal Rules of Civil Procedure, as Amended, and submits the following interrogatories to the defendant to be answered by the defendant under oath according to law, and moves the Court to order the defendant to produce for inspection and copying by the plaintiff all of the documents listed in this motion below if the defendant answers interrogatories concerning such documents in the affirmative. Plaintiff further states to the Court that the matters and things herein inquired about are material and relevant to the plaintiff's cause, and that plaintiff kept no record or records concerning the things herein inquired about but that it is the belief of the plaintiff that the defendant did make and keep the records in question.

Interrogatory No.

1. Please state on what date or dates plaintiff abused the sick leave provisions of the contract referred to in the complaint, as alleged in paragraph 3 of defendant's answer.
2. Was the plaintiff's suspension from defendant's employment on November 9, 1949, in writing?
3. If the answer to question No. 2 is in the affirmative, plaintiff moves the Court to order the defendant to produce said written notice of suspension for the plaintiff's inspection and copying.

[fol. 23]

4. If plaintiff's suspension notice of November 9, 1949, was not in writing, please state the name, position held with defendant, and home address of the person giving said suspension notice, both at the time of the giving of said notice and at the time of answering this interrogatory.
5. Was the plaintiff's notification of a hearing to be held on November 11, 1949, as alleged in paragraph 3 of defendant's answer, in writing?

Interrogatory No.

6. If the answer to question No. 5 is in the affirmative, plaintiff moves the Court to order defendant to produce a copy of said notification of hearing for inspection and copying by the plaintiff.
7. Was the hearing as alleged in paragraph 3 of defendant's answer held before an official or employee of the defendant?
8. If the answer to question No. 7 is in the affirmative please state the name, position held with the defendant, and home address of said employee or official, both at the time of said hearing and at the time of answering this interrogatory.
9. Was a stenographic record made of the proceedings at said hearing?
10. If the answer to interrogatory No. 9 is in the affirmative, plaintiff moves the Court to order defendant to produce a copy of said stenographic record for inspection and copying by the plaintiff.

[fol. 24]

11. Please state the name, position held with the defendant, and the address, both at the time of said hearing and at the time of answering this interrogatory, of every employee of the defendant who was present at said hearing, either as an observer, adviser, counselor, or witness.
12. Were records or exhibits of any kind introduced into evidence or presented as evidence against the plaintiff at said hearing?
13. If the answer to interrogatory No. 12 is in the affirmative, plaintiff moves the Court to order defendant to produce a copy of all said records or exhibits for inspection and copying by the plaintiff.
14. Was a written decision issued within five work days after the close of said hearing?
15. If the answer to interrogatory No. 14 is in the affirmative, plaintiff moves the Court to order the defendant to produce said written decision for inspection and copying by the plaintiff.

Interrogatory No.

16. Over what period or periods of time had the plaintiff been employed by the defendant according to the records of defendant, and during said period or periods in what capacity was the plaintiff employed by the defendant, and at what locations within the defendant's inter-national system of airways was the plaintiff so employed?

17. Do the records of the defendant show that the plaintiff was on leave or leaves of absence at any time during 1949?

[fol. 25]

18. If the answer to question No. 17 is in the affirmative, please state the date or dates of such leave or leaves of absence as shown by the records of the defendant, and the cause or reason therefor.

19. Do the records of the defendant show the number of sick leaves taken by the plaintiff during his entire period of employment with the defendant?

20. If the answer to question 19 is in the affirmative, please state the date or dates on which sick leave or leaves were taken and the reasons therefor, and whether or not the plaintiff was compensated for time off on such sick leave or leaves and the amount of such compensation, if any.

21. Did an official or an employee of the defendant make a complaint against the plaintiff for abusing the sick leave provision of the contract referred to in the complaint?

22. If the answer to question No. 21 is in the affirmative, please state the name and address of such official or employee, and the position held by him with the defendant, both at the time said complaint was made and at the time of answering this interrogatory.

23. What is the net financial worth of the defendant, Transcontinental And Western Air, Inc.; and please explain how such net financial worth of the de-

[fol. 26] fendant is computed.

Interrogatory No.

24. Has defendant issued a financial statement for the year 1950?
25. If the answer to question No. 24 is in the affirmative, plaintiff moves the Court for an order requiring defendant to produce a copy of such financial statement for inspection and copying by the plaintiff.
26. What is the name and address of the individual responsible for the preparation of defendant's financial statement?
27. Where are the company-wide financial statements of the defendant located, and what is the name and address of their present custodian?

Fred J. Freel, Attorney for the Plaintiff.

Received copy of the foregoing Interrogatories and Motion to Produce, this *29th* day of August, 1950.
Garrett & Ruark, Attorney for Defendant.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

ANSWERS TO INTERROGATORIES TO DEFENDANT AND MOTION TO PRODUCE—Filed September 12, 1950

Comes now the defendant, Trans World Airlines, Inc., by John P. Mead, its Labor Relations Director, makes Answer to Written Interrogatories heretofore filed, and states:

1. November 8, 1949.
2. Yes.
3. —.
4. See answer to 2.
5. Yes.
6. —.
7. Yes.
8. Mr. E. T. Huff, Manager—Line Maintenance, 6032 Hardy, Merriam, Kansas.

9. No.
10. See answer to 9.
11. C. F. Woodling, Regional Director Industrial Relations, 220 West 70th Terrace, Kansas City, Missouri; A. N. DeMattia, Mechanic, (Unknown); V. Villnave, Inspector, 5607 Virginia, Kansas City, Missouri; C. E. Bowman, Inspector, Route #10, North Kansas [fol. 28] City, Mo.; H. M. Hamarstrom, Master Mechanic 4121 Walnut, Kansas City, Missouri; W. J. Parker, Foreman—Engine Prod., R. R. #1, Kansas City, Kansas; R. W. Lichtenberger, General Foreman Aircraft Shop, 3071 North 32nd St. Kansas City, Kansas; L. D. Myers, Manager—Overhaul, 4811 Coronado Road, North Kansas City, Mo.; W. W. Hawkins, Administrative Assistant, 4206 West 73 Terrace, Mission, Kansas; F. M. Hicklin, Personnel Administrator, 413 East 45th St., North Kansas City, Mo.
12. No.
13. See answer to 12.
14. No written decision was issued inasmuch as plaintiff voluntarily resigned at the conclusion of said hearing.
15. See answer to 14.
16.

Date	*Position*	*Location*
10-19-42- 3- 1-43	Apprentice Mechanic #1	Washington National Airport
3- 1-43- 7- 1-43	Junior Mechanic #2	Washington National Airport
7- 1-43- 1- 1-44	Junior Mechanic #1	Washington National Airport
1- 1-44- 5-28-45	Mechanic	Washington National Airport
5-28-45- 3- 9-46	Mechanic	Overseas
[fol. 29]		
3- 9-46- 3-28-46	Mechanic #1	Washington National Airport
3-28-46- 8-16-46	Senior Mechanic	Newark, New Jersey
8-16-46- 9- 1-46	Senior Supv. Mechanic	Paris

9- 1-46	11-16-46	Senior Mechanic	New Castle, Delaware
1- 1-47	2-23-48	Mechanic	New Castle, Delaware
2-23-48	6- 1-48	Lead Mechanic	New Castle, Delaware
6- 1-48	7-16-48	Mechanic	New Castle, Delaware
7-16-48	7-20-48	Supv. Mech. Hgr.	New Castle, Delaware
7-20-48	7-13-49	Supv. Mech. Hgr.	Jedda, Saudi-Arabia
7-13-49	9- 4-49	Mechanic	Kansas City, Kansas
9- 4-49	11- 9-49	Master Mechanic	Kansas City, Kansas

17. Yes.

18. *Date of Absence*	*Cause or Reason therefor Given by Plaintiff*
8-17-49	Upset Stomach
8-18-49	Upset Stomach
9-28-49	Upset Stomach.
10-19-49	Sore throat and cold
11-8 -49	Unknown

19. No.

20. See answer to 19.

21. Yes.

22. Mr. L. D. Myers, Manager—Overhaul, 4811 Coronada Road, North Kansas City, Missouri.

[fol. 30] 23. The net worth of the defendant on December 31, 1949 was $20,955,464. The balance sheet reflecting said net worth and related statements of income and surplus were certified by Messrs. Haskins & Sells, Temple Building, Kansas City 6, Missouri on March 16, 1950.

24. No.

25. See answer to 24.

26. Mr. A. V. Leslie, Vice President and Treasurer, 20 West 9th Street, Kansas City, Missouri.

27. See answer to 26.

Trans World Airlines, Inc., By John P. Mead, Labor Relations Director.

Duly sworn to by John P. Mead. Jurat omitted in printing.

[fol. 31] Received a copy of the above and foregoing Answers to Written Interrogatories this *17th* day of September, 1950.

Fred J. Freel, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S INTERROGATORIES TO DEFENDANT—Filed February 12, 1951

Comes now the plaintiff under rule 33 of the Federal Rules of Civil Procedure, as amended, and submits the following interrogatories to the defendant to be answered by the defendant under oath according to law. Plaintiff further states to the Court that the matters and things herein inquired about are material and relevant to plaintiff's cause, and are wholly within the custody or knowledge of the defendant.

1. Please state the number of employees of the defendant who were charged with abuse of the sick leave provisions of the contract referred to in the complaint during each of the twelve months of 1949, at defendant's overhaul base in Kansas City, Kansas.

2. Please state the number of employees at defendant's overhaul base in Kansas City, Kansas who were discharged for abuse of the sick leave provisions of the contract rereferred to in the complaint during each of the twelve months of 1949.

3. Did the defendant have a written or unwritten policy of interpretation or administration of the sick leave provisions of the contract referred to in plaintiff's petition?

4. If the answer to interrogatory No. 3 is in the affirmative, please state such policy in the answer to this interrogatory.

5. Was there any change in the defendant's policy pertaining to the sick leave provisions of the contract referred to in the complaint in October or November of 1949?

[fol. 33] 6. If the answer to interrogatory No. 5 is in the affirmative, please state what the change in policy was.

7. Were there any letters, posters, signs or notices distributed to or placed upon a bulletin board for the information of defendant's employees at its overhaul base in Kansas City, Kansas by the defendant during 1949 which pertained to the sick leave provisions of the contract referred to in plaintiff's petition?

8. If the answer to interrogatory No. 7 is in the affirmative, are copies of such letters, posters, signs or notices still in the possession of the defendant and what is the name of their custodian?

9. What was the practice or custom of the defendant in regard to "confirmation of sickness" of an employee at its overhaul base in Kansas City, Kansas during 1949 upon an employee's return to work after an illness of one day or after any absence from work due to illness of an employee at said overhaul base?

Fred J. Freel, Attorney for Plaintiff, 900 Bryant Building, Kansas City, Missouri, HArrison 3632.

Mailed copy of foregoing to Garrett & Ruark, Attorneys for Defendant, 822 Scarritt Building, Kansas City, Missouri with sufficient postage thereon, this *12th* day of February, 1951.

Fred J. Freel, Attorney for Plaintiff.

[fol. 34] [File endorsement omitted]

[fol. 35] IN UNITED STATES DISTRICT COURT

ANSWERS TO PLAINTIFF'S INTERROGATORIES TO DEFENDANT—
Filed February 28, 1951

Comes now the defendant, Trans World Airlines, Inc., by John P. Mead, its Labor Relations Director, makes Answer to Written Interrogatories heretofore filed, and states:

1. One employee was charged with abuse of the sick leave provisions of the contract referred to in the complaint during the month of October 1949 and four employees were so charged during the month of November 1949.

2. As a result of the charges set out in (1) above, one employee was discharged in November 1949 and one resigned in October 1949 and two resigned in November 1949.

3. Yes.

4. While the defendant had no written policy of interpretation or administration of the sick leave provisions of the contract referred to in plaintiff's petition, defendant's interpretation and administration was well known to and concurred in by the International Association of Machinists who represented defendant's employees under said contract. Said interpretation and administration can be summarized as follows: Physician's certificates were not ordinarily required to confirm illness of three days or less, the defendant relying on the honor of the individual employee in [fol. 36] stating that he was too ill to perform his assigned tasks. Employees and the Union recognized an obligation to be truthful and honest and to prevent unnecessary absences and other abuses of sick leave privileges. The Union cooperated with defendant in pointing out to its membership the absolute necessity of preventing abuses if defendant was to continue its liberal policy. Abuse of sick leave privileges was recognized as a serious offense involving suspension and dismissal. When evidence of abuse came to the attention of the defendant, the employee involved was

suspended pending hearing under Article XI of said contract.

5. No.
6. See (5).
7. No.
8. See (7).
9. See (4).

Trans World Airlines, Inc., By John P. Mead, Labor Relations Director.

[fol. 37] *Duly sworn to by John P. Mead. Jurat omitted in printing.*

Mailed copy of foregoing to Fred J. Freel, 900 Bryant Bldg., this *28th* day of Feb., 1951, Jean M. Brady, Notary Public. My Commission Expires Oct. 15, 1954.

Ruby D. Garrett, Attorney for Defendant.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

PRE-TRIAL ORDER OF THE DISTRICT COURT—December 28, 1950

At a pre-trial conference held in the above-entitled cause, the following stipulations and agreements were made:

At the time of the bringing of this action, plaintiff was a resident of the State of Kansas.

Exhibit A, here marked, is a copy of the agreement between Transcontinental and Western Air, Inc., and the Mechanics and Related Employees in the service of Transcontinental and Western Air, Inc., as represented by the International Association of Machinists, executed March 22, 1949, said contract being the bargaining agreement covering plaintiff's employment with defendant. Said exhibit is now admitted in evidence and made a part of the record in this cause.

Exhibit 1, here marked, is a copy of a letter, dated November 9, 1949, relative to the suspension of plaintiff and

hearing to be held regarding the same on November 11, 1949. Plaintiff contends that copy of said letter was not delivered to him until after the hearing therein referred to was held. Defendant's contention is that a copy of said letter was delivered to plaintiff by Mr. Parker on November 9, 1949.

Exhibit 2, here marked, is the resignation executed by plaintiff, under protest, on November 11, 1949, after hearing on plaintiff's suspension was held before Mr. Ed Huff.

Exhibit 3, here marked, is a copy of Employee's Notification of Absence, as prepared by one of defendant's nurses, relative to plaintiff's absence from service on [fol. 39] November 8, 1949.

Said above exhibits are now admitted in evidence and made a part of the record in this cause, subject to the respective contentions of the parties.

It is plaintiff's theory that he was not given written notice of the charge made against him before hearing was held on his suspension from service. Plaintiff admits that he attended the hearing so held on November 11, 1949, and knew of the nature of the charge made against him prior to attending. It is plaintiff's further contention that the hearing held by Mr. Ed Huff, Manager of Line Maintenance for defendant, was a prejudiced and unfair hearing, in that Mr. Huff pre-judged said matter before hearing evidence thereon. After said hearing was held, Mr. Huff announced a decision to the effect that plaintiff should be discharged from service, but, before officially entering such decision, he extended to plaintiff an opportunity to accept said decision or to execute a resignation from service. Plaintiff thereafter executed a resignation, but he contends that he did so under protest.

Defendant's contention is that, after written notice of the nature of the charge made against plaintiff, a hearing was held, at the termination of which plaintiff executed a resignation from service.

The parties are to submit trial briefs and requests for charge to be made by the Court on each issue here involved, five (5) days before trial.

[fol. 40] This cause is now set for trial on Monday, January 29, 1951, at 10:00 o'clock, A.M., before a jury.

It is ordered that the trial of this cause be governed by the above stipulations and agreements, unless modified by the Court to prevent manifest injustice.

Albert A. Ridge, Judge.

Dated at Kansas City, Missouri, this *28th* day of December, 1950.

Filed in the United States District Court December 29, 1950.

[fol. 41] PLAINTIFF'S EXHIBIT "A"

TRANSCONTINENTAL & WESTERN AIR, INC.

TWA

Trans World Airline

AGREEMENT

between

Transcontinental & Western Air, Inc.

and

The Mechanics and Related Employees

in the Service of

Transcontinental & Western Air, Inc.

as represented by

International Association of Machinists

Effective March 22, 1949

[fol. 41-1] This Agreement is made and entered into this 22nd day of March, 1949, in accordance with the provisions of Title II of the Railway Labor Act, as amended, by and between Transcontinental & Western Air, Inc., hereinafter referred to as the "Company", and the International Association of Machinists, hereinafter referred to as the "Union," and representing all employees of the Company

comprising maintenance of equipment employees and including all grades of Mechanics and Inspectors, Fleet Service Helpers and Ground Service Helpers; Cargo, Commissary, and Stockroom employees as certified by the National Mediation Board on November 20, 1945, and May 15, 1946.

Article I

Purpose of Agreement

(a) The purpose of this Agreement is, in the mutual interest of the Company and the employees, to provide for the operation of the services of the Company under methods which will further, to the fullest extent possible, the safety of air transportation, the efficiency of operation, and the continuation of employment under conditions of reasonable working hours, proper compensation, and reasonable working conditions. It is recognized by this Agreement to be the duty of the Company and the employees to cooperate fully, both individually and collectively, for these purposes.

(b) No employee covered by this Agreement will be interfered with, restrained, coerced, or discriminated against by the Company, its officers, or agents, because of membership in or lawful activity on behalf of the Union.

(c) It is understood that wherever in this Agreement employees or jobs are referred to in the masculine gender, it shall be recognized as referring to both male and female employees.

Article II

Scope of Agreement

(a) The Company agrees all work generally recognized as mechanical inspection work, mechanic's work, and helper's work performed in and about Company shops, maintenance bases, overhaul bases, line service stations, and [fol. 41-2] other Company facilities, including but not limited to mechanical work, involved in dismantling, overhauling, repairing, fabricating, assembling, welding, and erecting all parts of airplanes, airplane engines, radio equipment, electrical systems, heating systems, hydraulic systems, and machine tool work in connection therewith, and including the dismantling, repairing, assembling, and erecting of all machinery and mechanical devices and auto-

motive and building maintenance and repair work, and the work of Stores Clerks, Commissary Clerks, Commissary Helpers, and Cargo Agents in the handling of stores stock, commissary supplies, mail, express, cargo and freight is recognized as coming within the jurisdiction of the International Association of Machinists and is covered by this Agreement.

(b) Employees covered by this Agreement shall be governed by all Company rules, regulations, and orders previously or hereafter issued by proper authorities of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to the affected employees prior to becoming effective.

(c) It is agreed that all work covered by this Agreement shall be performed by employees in the classifications specified herein, except that at other than major stations or overhaul bases on shifts where there is not sufficient work as herein described for Ground Service Helper, Fleet Service Helper, Commissary Clerk, or Cargo Agent to justify the assignment of an employee coming within any of these classifications, any employee who is in the same or higher pay bracket may be assigned to do the work.

It is recognized that at major stations where more than the scheduled number of flights are on the ground at one time or in cases of emergency where it is necessary in order to maintain flight schedules, any employee who is in the same or higher classification may be assigned to the performance of work covered by any of the classifications listed above. In this event it is understood, however, that employees outside the classifications covered by this Agreement will not be assigned to perform this work if employees in the same or higher classifications covered by this Agreement are available and can be assigned without interfering with their regular duties. If the Union doubts the fairness of the assignment, it may invoke the grievance procedure for settlement of the matter.

[fol. 41-3] Article III

Status of Agreement

(a) It is expressly understood and agreed that when this Agreement is accepted by the parties and signed by their authorized representatives, it will supersede any and all agreements existing or previously executed between the Company and any Union or individual affecting the craft or class of employees covered by this Agreement.

(b) It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company. In case of a consolidation or merger, representatives of the Company and the Union will meet without delay and negotiate for proper provisions for the protection of employee seniority and other property rights.

(c) All matters not covered by this Agreement or the Railway Labor Act, as amended, shall remain exclusively and without limitation within the prerogatives of Management.

Article IV

Classifications of Work

(a) Mechanical Classification

(1) Lead Inspector

The work of a Lead Inspector shall consist of and include leading and directing the work of Inspectors and performing such inspection work as may be required to the satisfaction of the Company, and must hold valid Federal licenses as required for his assignment as set forth in Article V. A Lead Inspector will not supervise or direct the working force other than Inspectors but may be required to give "on-the-job" instruction and training to Inspectors.

(2) Inspector

The work of an Inspector will consist of and include the overall inspection of Company aircraft (including power plant) in connection with major repairs and overhauls at those points on the Company's system

where such work is performed. The work of Inspector will include the inspection of materials, parts, and subassemblies as necessary. An Inspector must be capable of performing the inspection work as-
[fol. 41-4] signed to the satisfaction of the Company and must hold valid Federal licenses for his assignment as set forth in Article V. He shall be selected from the Mechanic or higher classification and will not supervise or direct the working force.

(3) Lead Mechanic

The work of a Lead Mechanic shall consist of and include leading and directing the work of other employees of the Mechanic or lower classification and performing such mechanical work as may be required to the satisfaction of the Company and must hold valid Federal licenses as required for his assignment, as set forth in Article V. A Lead Mechanic may be required to sign for his own work and the work of others in his group (not including work historically performed by Inspectors), provided, however, that such signing shall not relieve any other member of his group from responsibility for the work he performed or from being required to sign appropriate Company work records. A Lead Mechanic may be required to give "on-the-job" instruction and training to employees of any classification except Inspectors covered by this Agreement.

(4) Master Mechanic

A Master Mechanic shall be any Mechanic who, after two and one-half (2½) years' employment by the Company as a Mechanic, has availed himself of an opportunity to take and successfully pass the applicable portions of the Master Mechanic's examination (written and practical) for his station or department or section thereof and who possesses valid Federal licenses as required for his assignment, as set forth in Article V. Applications for examination and assignment to Master Mechanic rating will be subject to Article V (a) (1). The Master Mechanic's ex-

amination as agreed upon by the Company and the Union for each branch of the mechanics' trade will afford the eligible Mechanic an opportunity to demonstrate his ability to perform any or all phases of construction, repairing, assembling, and installing all units or component parts of airplanes, engines, or equipment handled in the particular department or section to which assigned. A Master Mechanic may be required to give "on-the-job" instruction [fol. 41-5] to employees of the same or lower classification but shall not perform the work of a Lead Mechanic in leading and directing the work of other employees.

(5) Mechanic

The work of a Mechanic shall consist of and include any and all work generally recognized as mechanics' work performed in and about Company shops, maintenance bases, overhaul bases, and Company buildings, including but not limited to mechanical work involved in dismantling, overhauling, repairing, fabricating, assembling, welding, and erecting all parts of airplanes, airplane engines, radio equipment, electrical systems, heating systems, hydraulic systems, and machine tool work in connection therewith. In addition, the work of a Mechanic shall include the dismantling, repairing, assembling, and erecting of machinery, mechanical devices, automotive equipment, and building maintenance and repair work. A Mechanic with one year or more experience may be required to give "on-the-job" inforination to another Mechanic and to instruct apprentice mechanics, but will not be held responsible for instructing more than one (1) apprentice mechanic at any one time.

(6) Mechanic Helper

The work of a Mechanic Helper shall include the performance of simple repetitive jobs such as cleaning spark plugs, moving parts and equipment exclusive of stores stock, cleaning out oil tanks, other duties now recognized as work of a Mechanic Helper,

simple repetitive jobs as agreed upon between the Company and District 142 of the Union and assisting of Mechanics as required. Mechanic Helpers will perform no work generally recognized as Mechanics' work. The ratio of Mechanic Helpers to Mechanics (exclusive of Lead Mechanics, Master Mechanics, Inspectors, and Lead Inspectors) systemwide shall not exceed one to ten (1 to 10).

(7) Ground Service Helper

The work of a Ground Service Helper shall consist of and include driving all types of trucks, tractors, and automotive equipment, the servicing of aircraft and automotive equipment with fuel oil, and water, [fol. 41-6] the changing of oil, and the greasing of aircraft and automotive equipment, operation of bulk fuel stations, portable air conditioners, and booster batteries, the placing and removal of wing and engine covers, and the blocking and tying down of aircraft. A Ground Service Helper will maintain equipment used in his work in a clean, safe condition; however, he shall not perform any mechanical work of any nature. It is further agreed and understood that a Ground Service Helper may be required to perform other work of a general utility nature.

(8) Lead Ground Service Helper

A Lead Ground Service Helper will be familiar with all of the duties of a Ground Service Helper and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of the group.

(9) Fleet Service Helper

The work of a Fleet Service Helper shall include all cleaning, washing, and polishing of aircraft, both on the interior and exterior. He may also be required to clean all parts, ramp and automotive equipment. A Fleet Service Helper shall do all chatting of parking lots (provided that no driving is required), pulling nails, removing snow, cleaning ramps and side-

walks, moving materials and equipment (exclusive of stores stock), provided that he operates no machinery. The Fleet Service Helper will do all other work generally recognized as common labor, and may be required to perform janitor work, and he shall do no mechanical work or work of a higher classification.

(10) Lead Fleet Service Helper

A Lead Fleet Service Helper will be familiar with all of the duties of a Fleet Service Helper and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of the group.

(11) Janitor

The work of a Janitor at overhaul bases and maintenance bases shall consist of and include the cleaning [fol. 41-7] inside (also outside first story window washing) of buildings and hangars, sweeping shops and walks, grass cutting, and other work normally performed by Janitors.

(12) Lead Janitor

A Lead Janitor will be familiar with all of the duties of a Janitor and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of the group.

(b) Stores Classification

(1) Stores Clerk

A Stores Clerk will do all work generally recognized as the routine duties of a Stores Clerk in and about the Company storerooms and stockrooms. The duties of a Stores Clerk shall include the delivering of parts and materials at overhaul bases and other places where mechanics do not accomplish this work. The duties of a Stores Clerk shall also include the driving of trucks in transporting store supplies.

(2) Lead Stores Clerk

A Lead Stores Clerk will be familiar with all the duties of a Stores Clerk and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of a group.

(3) Receiving Inspector

A Receiving Inspector will be capable of inspecting and will inspect material received by the receiving section when inspection is required or assigned. It is understood that these employees will not do any work recognized as mechanics' work.

(c) Commissary Classification

(1) Commissary Helper

The work of a Commissary Helper will consist of and include the cleaning of all equipment used in the operation of the commissary, and Commissary Helpers will also be responsible for the cleanliness of the department. Commissary Helpers will not be permitted to perform any of the other duties of a Lead
[fol. 41-8] Commissary Clerk or Commissary Clerk.

(2) Commissary Clerk

The work of a Commissary Clerk will consist of and include the checking and handling of commissary and passenger service supplies and equipment, and shall include necessary work relative to the preparation of planes' service equipment for flight. In addition, the work of a Commissary Clerk will include transporting to and from the commissary or food unit and the planes such service equipment. Commissary Clerks will be responsible for loading and unloading equipment and shall do all similar work generally recognized as that of the commissary department.

(3) Lead Commissary Clerk

A Lead Commissary Clerk will be familiar with all the duties of a Commissary Clerk and Commissary

Helper and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of a group.

(d) Cargo Classification

(1) Cargo Agent

The work of a Cargo Agent shall consist of and include all manual work in connection with loading, unloading, and handling all mail, express, cargo and freight, and all similar work generally recognized as that of the cargo department. Nothing in this Agreement shall prevent a Cargo Agent from receipting for shipments tendered, completion of forms, etc., in preparation for advancement, when so approved by the station manager.

(2) Lead Cargo Agent

A Lead Cargo Agent will be familiar with all the duties of a Cargo Agent and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of a group.

(e) In the respective departments listed above, wherever it is necessary to maintain more than three (3) Mechanics on a shift, there will be one (1) Lead Mechanic; wherever [fol. 41-9] it is necessary to maintain more than three (3) Inspectors on a shift, there will be one (1) Lead Inspector; wherever it is necessary to maintain more than three (3) Stores Clerks on a shift, there will be one (1) Lead Stores Clerk; wherever it is necessary to maintain more than three (3) Commissary Clerks on a shift, there will be one (1) Lead Commissary Clerk; wherever it is necessary to maintain more than three (3) Cargo Agents on a shift, there will be one (1) Lead Cargo Agent. No Lead will be required to lead and direct the work of a group totaling more than twelve (12) other employees.

(f) Mechanics who held temporary rating as Master Mechanic under memorandum of agreement dated February 18, 1948, and who fail or have failed to pass the applicable

portion of the examination, or failed to apply therefor prior to November 2, 1948, may be required to continue an exercise of their Federal licenses in behalf of the Company in signing off work, aircraft, engines, or radio, but the wage rate of Master Mechanic may be discontinued until the Mechanic passes the examination.

(g) No Mechanic holding a permanent Master rating prior to February 18, 1948, will be required to take a further examination to maintain his rating.

Article V

Examinations and License Requirements

(a) Examinations for Master Mechanic Rating

(1) Applications for Master Mechanic's examination will be processed as promptly as possible. Those employees who successfully pass the Master Mechanic's examination will be given the Master rating and the Master wage rate within fifteen (15) days after the date the application is received by the Company; provided that unless the Company desires to increase the ratio, the maximum number of Master Mechanic ratings to be maintained on the system will not exceed forty (40) per cent of the total number of Mechanics, Master Mechanics, Lead Mechanics, Lead Inspectors and Inspectors during the year January 1, 1948, to December 31, 1948; fifty (50) per cent during the year January 1, 1949, to December 31, 1949; and sixty (60) per cent during the year January 1, 1950, to December [fol. 41-10] 31, 1950. The Company may exercise its option in giving or refusing to give examinations and assigning Master Mechanic ratings if the percentage is filled at the time. Mechanics achieving a Master rating under the provisions of this Agreement will not be required to take any further examinations or tests to maintain their rating.

(2) Where license or licenses are required, Mechanics possessing the required valid Federal licenses will be required to satisfactorily complete only the practical portion of the Master Mechanic examinations.

(3) Where license or licenses are not required, Mechanics will be required to complete both the written and practical portions of the Master Mechanic examinations.

(4) Employees who fail to pass the Master Mechanic examination will not be allowed to take the same examination within ninety (90) days from date of previous examination.

(5) The examinations, methods of grading, and application of the examination shall be reviewed with a Committee designated by District 142, and the results of any examination shall be open to inspection by the Local Committee.

(b) License Requirements

(1) Lead Inspectors and Inspectors

(a) Overhaul Bases

(1) Airplane Overhaul—Hangar

Must possess aircraft and aircraft engine license or radio-telephone license second class or higher depending upon the work to which normally assigned.

(2) Engine Overhaul — Propeller Department

Must possess aircraft engine license.

(3) Radio Department

Must possess radio-telephone second class or higher.

(b) Line Stations

Must possess aircraft and aircraft engine license or radio-telephone license second class or higher depending on work to which normally assigned.

[fol. 41-11] (2) Lead Mechanics and Master Mechanics

(a) Overhaul Bases

(1) Airplane Overhaul—Hangar

Must possess aircraft or aircraft engine license.

(2) Accessory Overhaul Departments where a license is obtainable.

Must possess aircraft or aircraft engine license.

(3) Engine Overhaul Department

Must possess aircraft engine license.

(4) Radio Department

Must possess radio-telephone license second class or higher.

(b) Line Stations

Must possess aircraft and aircraft engine license and restricted radio-telephone operator's permit, or radio-telephone license second class or higher if assigned to radio group.

(3) Line Service Stations

Mechanics holding or bidding for line service assignments may be required to possess valid aircraft and aircraft engine license and restricted radio-telephone operator's permit, or radio-telephone license second class if assigned to a Line Service radio shop or group. If required to possess such valid licenses, the job will be designated with Master Mechanic rating and successful bidders will be required to either have a Master Mechanic rating at the time of assignment or pass the practical portion of the Master Mechanic examination within ninety (90) days after assignment. If assigned without a Master rating to a mechanic job designated as requiring exercise of licenses, the regular rate of a Mechanic will be paid until application for examination is filed, and thereafter subject to successfully passing the examination.

(4) Mechanics regularly assigned to departments or groups not mentioned in (1) and (2) above will be required to successfully complete both the written and practical Master Mechanic examination to achieve a Master rating.

[fol. 41-12] (5) All examinations, practical and written, will be given during regular working hours without loss of time to employees.

(6) No employee accruing seniority as a Lead Inspector, Lead Mechanic, or Inspector on the date of this Agreement will be required to obtain additional licenses to maintain his rating.

In the event that Federal requirements are changed, the Company and the Union will meet and make such changes in the license requirement provisions as become necessary. In the event that Federal Agencies or their agents determine that the work experience which can be acquired in a particular shop does not constitute the experience required to obtain or renew Federal licenses, the requirements for such licenses under this Agreement shall be waived.

Article VI

Seniority

(a) Definitions:

(1) System seniority shall be defined as the length of service for which an employee receives credit, regardless of location, in any of the classifications covered by this Agreement, with this Company or any of its predecessors. The definition of system seniority shall include ability to perform the required work of the job in a satisfactory manner, and except as hereinafter provided shall accrue from the date of entering a classification on a regular assignment. System seniority shall be applicable only to the mechanical classifications and only to Mechanics and higher within the mechanical classifications.

(2) Point seniority shall be defined as the length of service for which an employee receives credit in a classification covered by this Agreement, at a point, and shall be superior to system seniority in making all determinations. The definition of point seniority shall include ability to perform the required work of the job in a satisfactory manner, and except as hereinafter provided, shall accrue from the date of entering a classification at a point on a regular assignment.

(b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of

[fol. 41-13] force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

(c) Probationary Employees:

Employees will be considered as probationary employees for the first ninety (90) days of their employment, and there shall be no responsibility on the part of the Company for the reemployment of probationary employees if they are discharged or laid off during this period. If retained after the probationary period, the names of such employees shall then be placed on the appropriate seniority list as of their date of hire.

(d) Seniority Lists:

(1) Seniority lists, corrected to December 1 and June 1 and prepared by the Company, shall be furnished each Local Committee and the General Chairman for the Union, and shall be posted on bulletin boards at each point on or before January 1 and July 1 each year. Errors of omission and typographical errors will be corrected currently with a copy furnished the General Chairman. Effective with the posting of July, 1948, seniority lists, protest of seniority dates for correction of dates or for addition or deletion of names shall be open for a period of thirty (30) days from date of posting. All subsequent seniority lists shall be open to protest for a period of fifteen (15) days from date of posting, but if the seniority date on a list is not protested within the prescribed time limit after the initial appearance of a name on a list, such date shall stand as correct and official on all subsequent lists. Any employee on leave, on special assignment, in a laid-off status, on vacation, or on sick or injured absence at the time of posting shall have a period of fifteen (15) days from the date of his return to service to file a protest, or the balance of the original correction period, whichever is greater. Except as hereinafter provided in paragraphs (3), (4), (5), and (6).

below, if two (2) or more employees within a classification have the same seniority date, their names will appear on the seniority list in alphabetical order.

(2) The classes or crafts covered by this Agreement will be grouped into four (4) general groups as [fol. 41-14] set forth below, with a separate seniority list for each classification within a group, and for the purpose of computing and applying seniority, it is understood that all Company operations within any city or metropolitan area shall be considered as one point, except at Kansas City, where two (2) points will continue to be recognized for employees in Group No. 2:

Group No. 1	Group No. 2
Lead Inspector	Receiving Inspector
Inspector	Lead Stores Clerk
Lead Mechanic	Stores Clerk
Mechanic	
Mechanic Helper	
Lead Ground Service Helper	
Ground Service Helper	
Lead Fleet Service Helper	
Fleet Service Helper	
Lead Janitor	
Janitor	
Group No. 3	**Group No. 4**
Lead Commissary Clerk	Lead Cargo Agent
Commissary Clerk	Cargo Agent
Commissary Helper	

(3) Employees covered by this Agreement who were classified as Mechanic, Senior Mechanic, Master Mechanic, Lead Mechanic, Inspector, or Lead Inspector on January 1, 1946, shall be credited with continuous seniority as a Mechanic from the date their name first appeared on the Company payroll as a Mechanic or higher classified employee. This seniority date shall be both their system seniority date and their point seniority date as a Mechanic on all future rosters, unless an individual has changed point location since

February 16, 1946, in which case the point seniority date will be the date of transfer to the new point.

(4) Employees covered by this Agreement who were classified as Lead Inspector, Inspector, or Lead Mechanic on May 15, 1946, shall be credited with actual days worked within the respective classifications prior to February 16, 1946, and shall be credited with continuous seniority within the respective classifications from the date their name again appeared on the Company payroll in the classification on a job not identified as "temporary" or "acting." If two or more [fol. 41-15] mechanics have entered the classification of Lead Mechanic or Inspector on the same date, they will be listed on the seniority list for the higher classification in the same order as shown on the Mechanic list. This seniority date shall be both their system and point seniority date within the respective classifications on all future rosters, unless an individual has changed point location since February 16, 1946, in which case the point seniority date will be the date of transfer to the new point.

(5) Employees reclassified from Apprentice Mechanic or Junior Mechanic during the year 1946 shall continue to have a seniority date of January 1, 1946, as a Mechanic on all future seniority rosters in the same order as indicated on the 1947 seniority lists, unless an individual has changed point location since January 1, 1946, in which case the point seniority date will be the date of transfer.

(6) Employees who were classified as Apprentice Mechanics at the time of entering the military or naval service of the United States prior to January 1, 1946, upon return to Company employment under the provisions of paragraph (f), Article XIII, if subsequently reclassified to Mechanic, shall be granted a seniority date of January 1, 1946, as a Mechanic. This seniority date will not govern the pay status of such employees and upon reclassification they will start at the minimum hourly rate of a Mechanic, and thereafter be subject to automatic progression based on actual time spent in the classification. Mechanic Helper Trainees

in the service of the Company on December 31, 1948, including those Trainees in active service and Trainees in laid-off status, will be classified as Mechanic on and after January 1, 1949. After reclassification to Mechanic, Trainees in the active service of the Company on January 1, 1949, will be permitted to work one (1) day as a Mechanic to establish seniority and then laid off if jobs are not available to which their seniority will entitle them.

(7) No seniority credit shall be transferred from one (1) of the above Groups to another under any conditions, and all accrued seniority within a group shall be canceled for an employee accepting transfer to another group covered by this Agreement. The [fol. 41-16] seniority status of an employee shall not be affected, however, if during a period of actual lay-off from a group, as a result of force reduction, he accepts employment within another group, unless he refuses to return, in order of seniority, when the force is again increased within his original group and classification.

(e) Loss of Seniority:

An employee will lose his seniority status and his name will be removed from the seniority lists under the following conditions:

(1) He quits or resigns.

(2) He is discharged for just cause.

(3) He does not inform the Company in writing or by telegraph of his intention to return to service within seven (7) days of receipt of a notice offering to re-employ him after a lay-off.

(4) He does not return to the service on or before a date specified in the notice from the Company after a lay-off, which date shall be not prior to fifteen (15) days after sending such notice; provided that subdivisions (3) and (4) of this paragraph (e) shall not apply to offers of temporary work. Any notice provided for in this paragraph (e) shall be sent by Registered Mail (return receipt requested) or telegram to

the employee at the last address filed by him with the Industrial Relations Department.

(5) He is absent three (3) consecutive work days without notifying the Company, unless satisfactory reason is given.

(6) He fails to return to work at the end of an authorized leave of absence.

(7) He engages in gainful employment while on leave of absence in violation of Article XIII (e).

(8) He is laid off and does not return to work for a period of two and one-half years after lay-off.

(f) Loss of Classification Seniority:

(1) Where employees at a point are accruing seniority in lower classifications at the same point and are affected by a reduction in force, they shall be required to immediately exercise their seniority in the highest classification their seniority will permit. Failure to exercise seniority within a classification will cause loss of seniority in the classification.

[fol. 41-17] (2) Any Lead Inspector, Inspector, or Lead Mechanic laid off in a reduction in force at a point and accruing seniority in lower classifications at another point will be required to exercise his seniority in the highest possible classification within ten (10) days after actual lay-off or his name will be stricken from the seniority list of the lower classifications in the order of refusal to exercise seniority.

(3) Any employee reduced from a classification due to a reduction in force and refusing to accept the first job open in the higher classification for which he is qualified at the point where reduced shall have his name removed from the seniority list for that classification at the point.

(g) Reduction and Increase of Working Force:

(1) Whenever the number of employees in any classification is reduced, the reduction shall be by classifications according to point seniority, and the employee with least seniority in the classification will be the first laid off. An employee displaced because

of a reduction in force may exercise point seniority in placing himself on the shift of his choice in any job for which he is qualified. In the event an employee is not qualified for any classification, he shall be laid off.

(2) Ten (10) work days' notice or pay therefor, at the Company's option, will be given employees affected before a reduction is made, and a list of those to be laid off will be furnished the Local Shop Committee and the System General Chairman. Where there is temporarily no work because of an Act of God, circumstances over which the Company has no control, or work stoppages and strikes by employees of the Company, it shall not be considered a normal reduction in force and subject to this provision.

(3) In the restoration of forces, seniority will apply in the reverse order, the senior qualified laid-off employee in the classification to be returned first. Employees laid off in a force reduction will accrue all classification seniority but shall only accrue service credit for pay purposes up to a maximum of thirty (30) calendar days after date of lay-off.

(4) It shall be the responsibility of each employee to file with the Industrial Relations Department of the [fol. 41-18] Company and with the System General Chairman of the Union a complete record of his qualifications for use in making proper determinations of an employee's ability in the future exercise of seniority.

(5) In case of demotion due to reduction in force, the employee demoted shall continue to accrue point seniority in the classification from which demoted.

(6) When, due to a seniority displacement, a change in an individual's days off, vacation periods, or shift becomes necessary, no notice will be required. Likewise, in the event an employee is to be laid off as a result of a senior employee exercising his seniority in bumping back, no notice will be required to the employee affected.

(7) An employee reduced from a classification shall not continue to accrue service for pay purposes in the higher classification from which reduced, but upon return to the higher classification will be paid not less

than the hourly rate applicable for previously accrued service.

(8) Employees laid off on account of a reduction in force will be given preference in accordance with system seniority at other points on the system where vacancies exist for which they are qualified, provided that such employees make application therefor, at the time of lay-off, with the privilege of returning to their home station when the force is increased and they are entitled to be recalled. Any such transfers shall be made without expense to the Company, but free non-positive air transportation will be granted the employee and dependent members of his family within the continental limits of the United States, to the extent permitted by law.

(h) General:

(1) Employees accepting temporary transfers to such jobs as may be agreed upon by the Company and the Union for a period not to exceed three (3) months or any extension thereof that may be agreed upon, and employees accepting promotion to actual supervisory positions will continue to accrue seniority in the classification at the point from which transferred or promoted.

(2) When an employee goes to a higher classification [fol. 41-19] within a Group, he shall continue to accrue point seniority in the lower classification at the point from which promoted. This shall not apply to employees in classifications below Mechanic in Group No. 1.

(3) Mechanic seniority will govern in determining successful bidders for Lead Mechanic or Inspector. Inspector seniority will govern in moving into the Lead Inspector classification and when Inspectors are not available, Mechanic seniority shall govern. Lower classifications in Group No. 1 will be governed by the same policy, i.e., Ground Service Helper seniority will govern in the selection of Lead Ground Service Helper; Fleet Service Helper seniority will govern in the selec-

tion of Lead Fleet Service Helper; and Janitor seniority will govern in the selection of Lead Janitor.

(4) The same principle of seniority in moving from a lower to a higher classification in Groups No. 2, No. 3, and No. 4 will be applied as set forth in paragraph (h) (3) above to govern classifications below that of Mechanic.

(5) When an employee moves to a higher classification under the terms of this Agreement to fill a temporary or bulletined job, he shall continue to accrue seniority in the lower classification at the point from which promoted, and in case of subsequent demotion from a bulletined job due to reduction in force, he shall continue to accrue point seniority in the classification at the point where demoted.

(6) Point seniority shall apply in the selection of shifts and days off within a classification within a department. It may be exercised only in case of bumping due to a reduction in force or when an opening occurs. In preparing days off and shift schedules, the Company will determine how many employees are needed on a shift and the determination will be based on the type of work needed and the classification.

(i) Geographical Relocation

In the event of the geographical relocation in whole or in part of any of the work performed by employees covered by this Agreement, the employees affected will be given an opportunity to transfer to the new location at Company [fol. 41-20] expense in accordance with the policy as set forth in the Policy and Procedure Manual and given full credit for their accumulated classification seniority at the point to which the work is transferred in whole or in part. It is understood that the increase or expansion of facilities at a particular point that does not involve a reduction in jobs or facilities at another point shall not be construed as a geographical relocation of work in whole or in part.

Article VII

Hours of Service

(a) Eight (8) consecutive hours, exclusive of a lunch period of not to exceed thirty (30) minutes, shall constitute a standard day's work.

(b) Forty (40) hours, consisting of five (5) eight-hour days, worked within seven (7) consecutive days, midnight Sunday to midnight Sunday, will constitute a standard work week. Each employee will have two (2) consecutive days scheduled as regular days off in each work week, and the only deviation from this practice of two (2) consecutive days off will be where under the local schedule adopted it is found necessary to rotate scheduled days off and in order to repeat the schedule, deviation is necessary. At overhaul bases every effort will be made in the future to arrange work schedules to allow Saturday and Sunday as regularly scheduled days off. The fixing of a work schedule allowing part of the employees of a facility Sunday of one week and Monday of the following week as regularly scheduled days off will not be deemed a violation of this provision. Five (5) days' notice must be given of change in the schedule of days off.

(c) When only one shift is employed at a particular station or facility, the starting time of the shift will be not earlier than 7:00 a.m. and not later than 8:00 a.m., and all employees will be allowed a lunch period of not to exceed thirty (30) minutes within the limits of the fourth and fifth hour of the shift, subject to paragraph (f) below.

(d) Where two shifts are employed, the starting time of the first shift will be governed by Section (c) above, and the second shift will start thirty (30) minutes before the close of the first shift or immediately following the first shift, or in the alternative, at 8:00 p.m., and the same allowance for lunch period shall be provided as in the [fol. 41-21] case of only one shift, subject to paragraph (f) below.

(e) Where three shifts are employed, the starting time of the first shift shall be governed by Section (c) above; the second shift will start thirty (30) minutes before the close of the first shift; and the third shift will start thirty

(30) minutes before the close of the second shift, subject to paragraph (f) below.

(f) Deviations from paragraphs (c), (d), and (e) above in this Article may be made at any station when the Company and the Union agree on a change in scheduled shift times.

(g) Working shifts shall be scheduled and posted at each station or facility.

(h) All employees will be granted a ten (10) minute rest period during the first half of their shift, and a ten (10) minute rest period during the second half of their shift without loss of time for the purpose of relaxation, smoking, etc., and a five (5) minute period as a personal cleanup period prior to quitting time.

(i) No employee will be called to work or required to report for work for less than eight (8) hours' work or pay therefor, except where recalled after completing a regular shift of eight (8) hours or more. Employees regularly in the service of the Company will be considered as required to report for eight (8) hours' work on their scheduled work days unless notified by the Company before the close of the last shift worked, or at least sixteen (16) hours before the start of their regular scheduled work shift, whichever period is shorter, that there will temporarily be no work because of an Act of God, circumstances over which the Company has no control, or work stoppages and strikes by employees of the Company. Any employee not notified by the Company, and as a result reporting for work when there is temporarily no work because of an Act of God, circumstances over which the Company has no control, or because of work stoppages and strikes by employees of the Company shall receive a minimum of four (4) hours' pay at his regular hourly rate.

(j) Employees who, because of the requirements of the service, are requested to start their lunch period prior to the fourth hour of their shift or complete their lunch period after the fifth hour of their shift will be allowed a thirty (30) minute lunch period as close to the regular lunch period as possible and paid for same at straight time [fol. 41-22] rate in addition to their regular straight time shift compensation. Every effort will be made to allow

the employees their lunch period within the limits of the fourth and fifth hours. In the event that the employee does not eat at all during his regular shift he will receive compensation for the lunch period at time and one-half, provided that the provisions of Article VIII (a) do not apply in this event.

Article VIII

Overtime and Holidays

(a) Overtime rate of time and one-half, computed on an actual minute adjusted to the nearest tenth of an hour basis with a minimum of one (1) hour overtime, shall be paid for all work performed in excess of eight (8) hours in any one day, for all work performed either in advance of or after regularly scheduled hours, and for all time worked on one of the two regularly scheduled days off each work week.

(b) Overtime rate of double time shall be paid for all hours in excess of the first eight (8) hours worked on one of the two (2) regularly scheduled days off each work week, for all time worked on the second regularly scheduled day off in a work week if the first regularly scheduled day off has been worked, and for all time worked in excess of twelve (12) hours in any twenty-four (24) hour period except when an employee, after bidding, voluntarily changes shifts. For overtime purposes, the twenty-four (24) hour period shall begin with the starting time of the employee's regular assigned shift.

(c) Work in excess of eight (8) hours in any twenty-four (24) hour period as a result of rotation of shifts shall be paid for at straight time rates for the second eight (8) hours or portion thereof worked during such twenty-four (24) hour period, provided that not less than seven and one-half (7½) hours shall have elapsed between the quitting time of the first shift and the starting time of the second shift.

(d) Employees covered by this Agreement will observe the following holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. Should any of the foregoing holidays fall on a Sunday, the day observed by the state, nation, or by Presidential proclamation shall

be considered a holiday. Any employee required to work [fol. 41-23] on any of the foregoing holidays shall be compensated at the rate of double time.

(e) Employees not required to work on the above-mentioned holidays will be compensated for the day at eight (8) hours at straight time rate unless the employee voluntarily lays off the scheduled work day immediately preceding and the scheduled work day immediately subsequent to the holiday; provided that absence due to conditions beyond the employee's control shall be sufficient to warrant the Company to pay for the holiday.

(f) Overtime shall be distributed as equally as possible among all qualified employees at the location or in the department where overtime is required, and employees will not be required to suspend work during regular working hours to absorb overtime.

(g) Except in an emergency, an employee will not be required to work overtime against his wishes.

(h) When an employee covered by this Agreement has been relieved for the day and is recalled to work, he will be paid not less than three (3) hours at the overtime rate applicable for each call.

(i) For continuous service after regular working hours, employees will not be required to work more than two (2) hours without being permitted to go to meals, and employees will be allowed a thirty (30) minute period in which to eat without loss of time.

(j) No overtime shall be worked except by direction of the proper supervisory personnel of the Company, except in cases of emergency where prior authority cannot be obtained.

(k) There shall be no pyramiding of the overtime rates provided for in this Agreement, and no employee shall receive more than double the straight time rate for any hours worked.

(l) Employees shall be given four (4) hours' notice of contemplated overtime work, except in cases of emergency, and at Line Stations where interruptions in flight schedules make a four (4) hour notice impossible.

Article IX

Field Service

(a) Employees covered by this Agreement engaging in emergency field service away from their base station to [fol. 41-24] restore airplanes or equipment to service shall be paid for such work on the same basis as paid at their base station, with a minimum of eight (8) hours at straight time rate, including any premiums to which they are regularly entitled, for each twenty-four (24) hour period away from the base station.

(b) All time spent in traveling or waiting in connection with emergency field service as defined in paragraph (a) above, including hours in excess of eight (8) hours in one day, will be paid for at straight time rate, if during the current twenty-four (24) hour period no work is required before or after traveling, and it is not an employee's regular day off or a holiday.

(c) All time spent in travel, waiting, or working at Company direction on scheduled days off, holidays, and in excess of eight (8) hours on scheduled work days when work is required, will be paid for at the overtime rate applicable. However, if travel is interrupted for any reason and employees are released by written order through an agent of the Company for five (5) consecutive hours or more, they shall not be paid for the time released, but in no event shall any employee receive less than eight (8) hours' pay at straight time rate for any twenty-four (24) hour period while away from his base station on field emergency service.

(d) Upon completion of emergency field service, employees shall return to their home station in accordance with the orders received at the time they left their home station, or in accordance with the orders they receive from the person to whom they are ordered to report in the field, and shall be compensated for the return trip in accordance with the provisions of paragraphs (b) and (c) above.

(e) Employees called from home for field service after completing their regular shift assignment, or on a regular day off, will be allowed one (1) hour as preparatory time in advance of scheduled departure time at the overtime

rate. In all possible cases they will be notified at least two (2) hours before departure time.

(f) Employees temporarily transferred at Company request from their home station to some other point to fill temporary vacancies will be paid in accordance with paragraphs (b) and (c) of this Article for the time necessary [fol. 41-25] to travel in connection with such temporary transfer, and shall receive necessary and reasonable expenses for transportation, laundry, meals, and lodging in accordance with paragraph (h) of this Article.

(g) When employees are away from their home station filling temporary vacancies at Company request, they shall be paid straight time and overtime in accordance with the provisions of this Agreement, based on the shifts as scheduled at the location of the temporary vacancy, but in no event shall they receive less than eight (8) hours' pay for each scheduled work day with a minimum of five (5) days each work week, if the employee is available for work. It is understood that the Company may schedule employees to take their regular days off each week without compensation except for reasonable and necessary expenses provided for in this Article, and it is also understood that no employee will receive less compensation per hour while filling a temporary vacancy than he would receive per hour at his home station.

(h) Where transportation, laundry, meals, and lodging are not provided by the Company for employees on emergency work or filling temporary vacancies at Company request away from their base station, necessary and reasonable expenses will be allowed. Upon application, an employee will be given an advance by the Company to cover his expenses while away from his base station. Expense reports shall be submitted by the employee not later than five (5) days after the last day of the period covered. Reports covering actual expenses shall be submitted for ten-day periods as follows: 1st to 10th, inclusive; 11th to 20th, inclusive; and 21st to last day of month, inclusive.

(i) When an employee covered by this Agreement receives a special assignment to attend training classes pertaining to his work, or to fulfill other special assignments not constituting emergency field service or the filling of

temporary vacancies at Company request, he shall receive compensation not to exceed eight (8) hours per day for the time spent in traveling or waiting, at the employee's straight time rate. If such special assignment involves traveling after completion of his regular work for the day, he shall receive the applicable overtime rate for the first succeeding eight (8) hours of traveling and waiting.

[fol. 41-26] Article X

Vacancies and Bidding

(a) A vacancy shall be any job (temporary or permanent in nature) which cannot be filled through an application of the seniority provisions of this Agreement providing for restoration of forces.

(b) Temporary Vacancies

(1) A vacancy of not to exceed thirty (30) days' contemplated duration will be considered temporary in nature and will not be bulletined. Such vacancies, however, in Group No. 1 for Lead Inspector, Inspector, Lead Mechanic, Lead Ground Service Helper, Lead Fleet Service Helper, and Lead Janitor; Group No. 2 for Stores Inspector and Lead Stores Clerk; in Group No. 3 for Lead Commissary Clerk and Commissary Clerk; and in Group No. 4 for Lead Cargo Agent shall be filled in accordance with seniority within the respective groups in so far as practical. In the event temporary assignment of work is necessary within a classification to fill a temporary vacancy not involving the temporary promotion of an employee from a lower to a higher classification, the assignment within the classification will be made in the reverse order of seniority in so far as practical.

(2) Employees assigned to temporary vacancies will, upon discontinuance of such temporary jobs, be returned to their former jobs and status, if such job still exists. If it does not exist, he may then exercise point seniority for any job for which he is qualified.

(3) When employees are temporarily transferred from their regular work to work of another classifica-

tion, either at their home station or away from their home station, they shall be paid their regular rate or the proper rate for the other classification, whichever is the higher, for all time worked, with a minimum of one hour. For the purpose of this paragraph, it is understood that the work of Master Mechanic and Mechanic shall be considered of the same class.

(4) In case of a vacancy in the classifications named in (c) below, which is not expected to exceed thirty (30) days, the Company may select a qualified employee to fill such vacancy on a temporary basis without bul-
[fol. 41-27] letining the job. In making the selection, due consideration will be given to seniority. At the end of twenty (20) days, the vacancy, if it still exists, will be reviewed by the local Union Committee and local Company management, and if it appears that the vacancy will continue for an additional thirty (30) days or longer, it will be bulletined.

(c) Bulletined Vacancies

(1) All jobs for which a premium rate is established, all new jobs, and all vacancies of more than thirty (30) days' anticipated duration, except as provided in (a) above, in the classifications of Lead Inspector, Inspector, Lead Mechanic, and Mechanic will be bulletined in all shops at each point. Such bulletin will state the contemplated duration of the vacancy, the number of jobs to be filled, the classification and type of each job, the station and department location, the basic hourly rate or premium rate at which the job is rated, the date the successful bidder is expected to report, and shall specify a final date after which bids will not be considered. Such date shall not be less than ten (10) calendar days after the bulletin is posted. Job vacancies involving the classifications of Lead Ground Service Helper, Lead Fleet Service Helper, Lead Janitor, Stores Inspector, Lead Stores Clerk, Stores Clerk, Lead Commissary Clerk, Commissary Clerk, and Lead Cargo Agent will be bulletined in like manner, but only at the station or location involved. Fleet Service Helper bids may be considered on Ground Service Helper vacancies.

(2) An employee bidding for more than one (1) vacancy shall indicate the order of preference on each bid, and if he is the senior bidder for more than one (1) vacancy, he shall have the opportunity to qualify for only the job ranked highest in his preference. All bids will be made in four (4) written copies, with one copy furnished to the employee's immediate supervisor, one copy furnished to the Company official in charge of bids, one copy furnished to the local Union representative, and one copy retained by the bidding employee.

(3) After an employee has been chosen to fill a bulletined job, the proper official of the Company shall, [fol. 41-28] within ten (10) calendar days after the close of the bulletin, mail to the General Chairman and all shops and locations a bulletin to be posted on the bulletin boards, showing the name of the employee selected to fill the job and his seniority date.

(4) If the successful bidder for a bulletined job is located at some point other than the point where the bulletined job is to be filled, the Company will furnish free non-positive transportation for the employee and for the dependent members of his immediate family, to the extent permitted by law, from the point from which he is transferring to the location of the bulletined job.

(5) A successful bidder shall hold the job to which assigned for a fair and reasonable period of time not to exceed ninety (90) days on a trial basis in order to demonstrate his ability to perform the work required, unless the job is found to be not as represented in the bulletin. In case the job is found to be not as represented in the bulletin, the employee may return at Company expense to his former location and assignment. During such trial period, if the employee is unable to demonstrate ability to perform the work required by the job, he will be privileged to exercise his seniority at his previous location by displacing only the employee with the least seniority in his classification holding a regular assigned job, and for a period of six (6) months thereafter his bid for a va-

cancy in the same or a higher classification for which he was unable to demonstrate ability will not be considered.

(6) During the interim required to bulletin a vacancy, the Company may select an employee to fill the vacancy temporarily; and the employee selected shall receive his regular rate of pay or the rate of the job, whichever is the higher, for such assignment. The selection will be made from qualified employees at the point involved, if possible, with due consideration for seniority.

(7) In the event a vacancy in the classifications covered by this Agreement which are subject to system seniority exists at any location on the Company's system and no qualified employee at the point bids, system bids will be considered. There being no system bids, the Company may hire a new employee into the classification at the location or shall have the right [fol. 41-29] to select to fill such position any qualified employee at any location willing to accept transfer at the Company's expense.

(8) Any employee named as a successful bidder for a bulletined job and refusing to accept the job will not be permitted to bid for another bulletined job for a period of six (6) months from the date of refusal, unless the job is proven to be not as represented in the bulletin.

(9) Mechanics, Lead Mechanics, or Inspectors declared successful bidders in a higher classification at some other point than the one at which they are located will continue to accrue seniority in the lower classification at the point from which they bid. In case of subsequent displacement from the higher classification at the new point, they will exercise their seniority by returning to the original point and displacing any employee with less seniority on any shift of their choice. In such cases, free space-available transportation will be furnished the employee and dependent members of his immediate family by the Company. All other expenses will be borne by the employee.

(10) After April 23, 1948, any Mechanic declared

successful bidder as a Mechanic at some other point than the one at which he is located, will continue to accrue seniority as a Mechanic at the point from which he bids for a period of one (1) year thereafter. In case of lay-off in a reduction in force at the new point during that year, he may exercise his seniority at time of lay-off by returning to the original point and displacing any employee with less seniority on a job for which he is qualified. In such cases, free space-available transportation will be furnished the employee and dependent members of his immediate family by the Company. All other expenses will be borne by the employee.

(11) No employee will be compelled to accept a permanent transfer against his wishes.

(12) It is the recognized policy of the Company to promote its own men to supervisory positions in so far as possible, and only when competent employees cannot be found in the ranks, or when competent employees will not accept vacancies or new positions, will it be the disposition of the Company to vary from this policy.

[fol. 41-30]

Article XI

Grievance Procedure

(a) Representation

The representation for presentation and adjustment of disputes or grievances that may arise under this Agreement shall be:

(1) The Union will be represented by properly designated stewards, one in each department or section thereof, for each shift at each point on the system. In addition, the Union will be represented by a Local Committee consisting of not more than three (3) members at each point, one (1) of whom shall be designated as Local Chairman. Where a metropolitan area with more than one location is involved, there may be separate stewards and a separate Committee at each location.

(2) The Union will be further represented by a System General Chairman for dealing with Division, Regional, or General Officials of the Company.

(3) The Company will be represented at each seniority point by an authorized official who will be empowered to settle local grievances or disputes not involving a change in Company policy or changes in the intent and purpose of this Agreement.

(4) The Company will be further represented on a division, regional, and system basis for dealing with the Union System General Chairman or his designated representative.

(5) The Union and the Company will, at all times, keep the other party advised, through written notice, of any change in authorized representatives.

(6) The System General Chairman, Assistant System General Chairman, and a reasonable number of Grand Lodge Representatives of the Union shall be permitted at any time to enter the facilities of the Company for the purpose of investigating grievances and disputes after contacting the Company official in charge and advising him of the purpose of the visit.

(7) It is agreed the Union and the Company will make every effort to keep to a minimum the actual time [fol. 41-31] spent in disposing of disputes or grievances. When the stewards or committeemen are required to leave their work for the purpose of investigating, presenting, and adjusting grievances or to attend meetings as provided for in this Article, they will first notify their immediate supervisor, if he is available, before leaving their work and will again report to him upon their return.

(16) Procedure

The procedure for presentation and adjustment of disputes or grievances that may arise between the Company and the Union with reference to the interpretation or application of any of the provisions of this Agreement shall be:

Step 1

(1) Any employee having a complaint or grievance in connection with the terms of employment, application of this Agreement, or working conditions, may present his complaint or grievance in writing to the department steward who, in turn, will, if in his opinion the complaint or grievance is justified, discuss the matter with the immediate supervisor of the employee and endeavor to arrive at a satisfactory adjustment. Written decision by the supervisor in this Step 1 shall be given the Union steward within two (2) work days after presentation of the complaint or grievance in writing.

Step 2

Kansas City, Los Angeles, New York, New Castle

(2) At Kansas City, Los Angeles, New York, and New Castle, if the decision in Step 1 is not satisfactory, the steward may, through the Local Committee, refer the matter to the Company's Industrial Relations Manager or his authorized representative at the particular point. The appeal to Step 2 must be presented in writing within five (5) work days after the decision of the supervisor in Step 1. The Industrial Relations Manager or his authorized representative to whom the matter is presented will meet in conference with the Local Committee and will issue his decision in writing within five (5) work days after the grievance has been presented to him.

[fol. 41-32]

Step 2A

All Other Points

(3) At all points other than those designated in (2) above, if the decision in Step 1 is not satisfactory, the steward may, through the Local Committee, refer the matter to the next higher level of supervision for the particular point, if a higher level of supervision is available. If no higher level of supervision is available, the matter may be referred di-

rectly to the Regional Industrial Relations Manager as provided in Step 2B. The appeal to Step 2A must be presented in writing within five (5) work days after the decision of the supervisor in Step 1. The supervisor to whom the matter is presented will meet in conference with the Local Committee and will issue his decision in writing within five (5) work days after the grievance has been presented to him.

Step 2B

(4) If the decision in Step 2A is not satisfactory, the Local Committee may refer the matter to the Company's Industrial Relations Manager or his designated representative for the particular region. The appeal to Step 2B must be in writing and mailed within ten (10) work days after the decision of the supervisor in Step 2A. The Industrial Relations Manager to whom the matter is presented will issue his decision in writing within five (5) work days after the grievance has been received by him.

Step 3

(5) If the decision in Step 2 or 2B is not satisfactory, then appeal may be made by the System General Chairman to the Chief Operating Officer of the Company or his authorized representative. Notice of intent to appeal will be in writing and must be made within ten (10) work days after the decision in Step 2 or 2B, and the actual appeal must be perfected and submitted within thirty (30) days from date of original notice. The decision in Step 3 must be given within ten (10) work days after presentation of the grievance in the third step.

(6) If the decision in Step 3 is not satisfactory to [fol. 41-33] the Union, the matter may be referred by the System General Chairman to the System Board of Adjustment or, by mutual agreement, submitted to arbitration as provided in Article XII hereof.

(7) Grievances relating to matters general in character which cannot be settled by an immediate super-

visor or local Union representatives shall be discussed by the Industrial Relations Manager of the region or overhaul base affected and the System General Chairman if such grievances are submitted in writing by either of them. If a satisfactory settlement is not reached within ten (10) work days after the grievance is submitted, such matters may be referred for handling in accordance with the provisions of Step 3 to the Chief Operating Officer for the Company or his authorized representative, if submitted by the Union, or to the International President of the Union or his authorized representative, if submitted by the Company.

(8) Any grievance not presented or appealed within the time limits prescribed in this Agreement, or such extension thereof as may have been agreed to, shall be considered automatically closed upon the basis of the last disposition.

(9) Grievances involving wage claims must be filed promptly after the cause giving rise to the grievance is evident, and wage claims will not be valid and collectible for a period earlier than thirty (30) days prior to the date of filing the grievance or the date the grievance arose, whichever is most recent.

(10) No employee who has been in the service of the Company ninety (90) days or more shall be discharged without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee. Suspension from the service of the Company pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised, in writing, of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. If a stenographic report of the investigation is taken, the Union Committee or representative will be furnished a copy. A written decision will be issued within five (5) work [fol. 41-54] days after the close of such hearing. If the decision is not satisfactory, then appeal may be made

in accordance with the procedure prescribed in Step 3.

(11) If it is found that an employee has been unjustly suspended or dismissed from the service, such employee will be reinstated with his seniority rights unimpaired, compensated for all wage loss, and his service record cleared.

(12) The Company will not discriminate against any witnesses called to testify in any hearing or investigation called by the Company, and if any employee witness is located at some other point than the point of hearing, employee witnesses and Union committeemen will be furnished necessary free non-positive transportation over Company lines.

(13) All hearings and investigations will be conducted during regular day shift working hours, in so far as possible, and stewards, committee members, and necessary employee witnesses shall not suffer loss of pay while handling grievances or attending investigations.

(c) General

(1) It is understood the System General Chairman or his authorized representative may intervene and participate in the handling of a grievance or dispute at any level of the grievance procedure.

(2) Probationary employees (new employees of less than ninety (90) days' service) covered by this Agreement shall not have recourse to the grievance procedure in the event of discharge or suspension within the probationary period.

(3) For the purpose of computing work days in connection with provisions of this Article, only the calendar days Monday through Friday each week shall be counted.

Article XII

System Board of Adjustment

(a) In compliance with Section 204, Title II, of the Railway Labor Act, as amended, there is hereby established a System Board of Adjustment for the purpose of adjusting and deciding disputes or grievances which may arise under

the terms of this Agreement and which are properly sub-
[fol. 41-35] mitted to it after exhausting the procedure for settling disputes, as set forth under Article XI. However, by mutual agreement, any case properly referable to this Board may be submitted to arbitration instead of to the Board.

(b) The System Board of Adjustment shall consist of four (4) members, two (2) selected by the Company and two (2) selected by the Union.

(c) Members of the Board will serve for one (1) year from the date of their appointment or until their successors have been duly appointed. Vacancies in the membership of the Board shall be filled in the same manner as is provided herein for the selection of the original members of the Board.

(d) The Board shall have jurisdiction over disputes between any employee covered by this Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of this Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, basic rates of compensation, or working conditions covered by this Agreement or any amendment hereto.

(e) The Board shall consider any dispute properly submitted to it by the System General Chairman of the Union or by the Chief Operating Officer of the Company or his authorized representative, when such dispute has not been previously settled in accordance with the terms provided for in this Agreement.

(f) Appointments of members of the Board shall be made by the respective parties within thirty (30) days from the date of the signing of this Agreement, and said appointees shall meet in the city of Kansas City, Missouri, within forty-five (45) days from the date of the signing of this Agreement and shall organize and select a Chairman and a Vice Chairman, both of whom shall be members of the Board. The terms of office of the Chairman and the Vice Chairman shall be one (1) year.

Thereafter the Board shall designate one of its members to act as Chairman and one to act as Vice Chairman for one (1) year terms. Each officer so selected shall serve for

one (1) year and until his successor has been duly selected. The office of Chairman shall be filled and held alternately by a Union member of the Board and by a Company member of the Board. When a Union member is Chairman, a Company member shall be Vice Chairman, and vice [fol. 41-36] versa. The Chairman or, in his absence, the Vice Chairman shall preside at meetings of the Board and at hearings and shall have a vote in connection with all actions taken by the Board. After the organization meeting referred to herein, the Board will thereafter meet in the city where the general offices of Transcontinental & Western Air, Inc., are maintained (unless a different place of meeting is agreed upon by the Board) during the first week in June and the first week in December of each year, provided that at such times there are cases filed with the Board for consideration, and shall continue in session until all matters before it have been considered, unless otherwise mutually agreed upon.

(g) All disputes properly referred to the Board for consideration shall be addressed to the Chairman, and notice thereof must be given in writing within thirty (30) days after final decision in the last step of the grievance procedure set forth in Article XI. Five (5) copies of each petition, including all papers and exhibits in connection therewith, shall be forwarded to the Chairman, who shall promptly transmit one (1) copy thereof to each member of the Board. Each case submitted shall show:

1. Question or questions at issue.
2. Statement of facts.
3. Position of employee or employees.
4. Position of Company.

When possible, joint submissions will be made, but if the parties are unable to agree upon a joint submission, then either party may submit the dispute and its position to the Board. No matter shall be considered by the Board which has not first been handled in accordance with the provisions of Article XI of this Agreement.

(h) Upon receipt of notice of the submission of a dispute, the Chairman shall set a date for hearing, which shall be at the time of the next regular meeting of the

Board or, if at least two (2) members of the Board consider the matter of sufficient importance and urgency, then at such earlier date and at Kansas City or such other place as the Chairman and Vice Chairman shall agree upon but not more than fifteen (15) days after such request for meeting is made by at least two (2) of said members, and the Chairman shall give the necessary notices in writing of [fol. 41-37] such meeting to the Board members and to the parties to the dispute.

(i) Employees covered by this Agreement may be represented at Board hearings by such person or person as they may choose and designate, and the Company may be represented by such person or persons as it may choose and designate. Evidence may be presented either orally or in writing or both. On request of individual members of the Board, the Board may, by majority vote, or shall at the request of either the Union members or the Company members thereon, call any witnesses who are employed by the Company and who may be deemed necessary by the parties to the dispute, or by either party, or by the Board itself, or by either group of members constituting the Board.

(j) A majority vote of all members of the Board shall be competent to make a decision.

(k) Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties hereto.

(l) In the event of a deadlock in the case of any dispute properly before it, it shall be the duty of the Board to endeavor to agree, within thirty (30) days from the date of such deadlock, upon a procedure for breaking such deadlock. A majority vote of all members of the Board shall be competent to reach such agreement and the action of the Board operating under such procedure shall be final and binding upon the parties hereto. If, after the expiration of said thirty (30) days, the deadlock is not broken or such case is not otherwise disposed of, either party may notify the other in writing that the services of a referee are desired. Within ten (10) days after such notification, the members of the Board will endeavor to select a referee. Any referee so selected shall sit with the Board as a member

thereof in the subsequent consideration and disposition of the case.

Within thirty (30) days after the selection of the referee as provided above, the Board and the referee shall consider and review the prior record in the case and may call such additional witnesses and receive such additional evidence as the Board may deem necessary. Either party may make written request to the Board for the privilege of presenting additional witnesses or documentary evidence, and the Board, with the referee, may, at their discretion, permit such presentations. The decision of the Board shall [fol. 41-38] be rendered within ten (10) days after the close of the hearing, and a majority vote of the members of the Board, including the referee, shall be necessary to reach such decision, which shall be final and binding upon the parties hereto.

The expenses and reasonable compensation of the referee selected as provided herein shall be borne equally by the parties hereto. The time limits specified in paragraph (l) of this Section may be extended by mutual agreement of the parties to this agreement.

(m) Nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded either to the employees or to the Company or to their duly accredited representatives, under the provisions of the Railway Labor Act, as amended.

(n) The Board shall maintain a complete record of all matters submitted to it for its consideration and of all findings and decisions made by it.

(o) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the Board members selected by it.

(p) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the witnesses called or summoned by it. Witnesses who are employees of the Company shall receive non-positive free transportation over the lines of the Company from the point of duty or assignment to the point at which they must appear as witnesses and return, to the extent permitted by law.

(q) The Chairman and the Vice Chairman, acting jointly, shall have the authority to incur such other ex-

penses as in their judgment may be deemed necessary for the proper conduct of the business of the Board, and such expenses shall be borne one-half by each of the parties hereto. Board members who are employees of the Company shall be granted necessary leave of absence for the performance of their duties as Board members.

Board members shall be furnished non-positive free transportation over the lines of the Company for the purpose of attending meetings of the Board, to the extent permitted by law.

(r) It is understood and agreed that each and every Board member shall be free to discharge his duty in an independent manner, without fear that his individual relations with the Company or with the Union may be affected in any manner by any action taken by him in good faith in his capacity as a Board member.

[fol. 41-39] Article XIII

Leave of Absence

(a) When the requirements of the service will permit, any employee hereunder shall, upon proper application and approval of the Company, be granted a leave of absence in writing for a period not in excess of ninety (90) days. Under such leaves, the employee shall retain and continue to accrue seniority and the Union shall be notified of all leaves granted. A copy of the leave of absence notification shall be sent to the System General Chairman.

(b) Such leave or leaves may be extended for additional periods not to exceed ninety (90) days when approved by both the Company and the Union, in writing, and seniority will accrue during such extension.

(c) Employees accepting full-time employment with the Union as a District Officer or Grand Lodge Officer, or on special assignments in the interest of the Company, shall be granted an indefinite leave of absence by the Company for the period so employed as long as this Union remains the exclusive bargaining agency of employees covered by this Agreement. The employees selected as System General Chairman and his Assistant shall have all employee benefits that can reasonably be continued in effect during

their leave of absence. Under such leaves, the employee shall continue to accrue seniority.

(d) Employees hereunder returning from an authorized leave of absence or extension thereof will be returned to the job held when the leave was granted. If the job no longer exists, he may exercise his seniority. An employee returning from a leave of absence must give notice of return in writing to the Company at least ten (10) days prior to his anticipated return.

(e) Any employee hereunder on leave of absence engaging in gainful employment not provided for in paragraph (c) above without prior written permission from both the Company and the Union shall forfeit his seniority rights and his name will be stricken from the seniority roster.

(f) Any employee enlisting in, drafted, or conscripted for military or naval service in defense of the United States during an actual period of war, or any employee drafted or conscripted by Act of Congress for military or naval training, shall retain his seniority rights unimpaired and upon honorable discharge from such service shall be re-[fol. 41-40] stored to his former position or one of equal rating in accordance with the exercise of seniority rights, provided he applies for reinstatement within ninety (90) days following his discharge from military or naval service. In case of temporary or partial disability which makes it impossible to return to work within ninety (90) days after discharge, special arrangements will be made by the Company and the Union for a proper extension of time.

Article XIV

Safety and Health

(a) Employees entering the service of the Company may be subjected to a physical examination. The cost of any such examination will be paid by the Company.

(b) The Company hereby agrees to maintain safe, sanitary, and healthful conditions at all points and to maintain on all shifts proper first aid equipment to take care of its employees in case of accident or illness. The Company agrees to furnish good drinking water, and sanitary foun-

tains will be provided where necessary. The floors of the toilets and washrooms will be kept in good repair and in a clean, dry, and sanitary condition. Shops and washrooms will be lighted and heated in the best manner possible, consistent with the source of heat and light available. Lockers will be provided for all employees within a reasonable time.

(c) In order to eliminate, as far as possible, accidents and illness, an adequate safety committee will be established at each point where advisable on the system, to be composed of an equal number of Union and Company representatives. The Union and the Company shall each appoint not more than three members. The Chairman of the Local Safety Committee shall be the Safety Manager, wherever a Safety Manager is permanently stationed. The safety committee will make periodic inspections for the purpose of seeing that all safety and sanitary regulations are complied with as well as to make recommendations for the maintenance of proper standards.

(d) No employee shall be discharged or suspended pending an investigation by the safety committee for refusing to work on a job which is not reasonably safe and/or sanitary or which might endanger his health.

[fol. 41-41] (e) Proper and modern safety devices shall be provided for all employees working on hazardous or unsanitary work, such devices to be furnished by the Company.

(f) The Company will furnish protective clothing for the use of employees required to work with acids or chemicals that are injurious to clothing and personnel. Suitable rain suits or protective outer garments shall be kept available at all shops or points by the Company.

(g) Employees taken sick or injured while at work shall be given medical attention at the earliest possible moment, and employees will be permitted to return to work without signing any releases of liability pending the disposition or settlement of any claim for damage or compensation.

(h) Wherever the Company shall require a standard coverall, the coverall will be furnished at Company expense and laundering shall be done at Company expense. The coverall will remain the property of the Company. The Company will make available for sale to employees all

items of standard uniform at cost, and the cost of coverall insignia and its application to the coverall shall not be considered as part of the cost and the employee will not be charged therefor. New employees will be issued a cap and emblem for which no charge will be made, but the employee must make a deposit on the emblem which will be refunded in the event his employment terminates and he turns in the emblem.

Article XV

Free Transportation

(a) Employees covered by this Agreement will be granted the same transportation privileges on the Company system as may be established by Company regulations for all comparable personnel.

(b) The System General Chairman of the Union will be furnished with transportation over the Company system within the continental limits of the United States during his term of office for use in connection with his work to the extent permitted by law.

(c) Employees laid off by the Company in a reduction of force who desire to seek employment elsewhere will, upon application, be granted on one occasion free, one-way, non-[fol. 41-42] positive air transportation on the Company's planes to any point on the system within the continental limits of the United States, to the extent permitted by law.

Article XVI

Vacations

(a) Employees will be eligible for annual paid vacations based on the number of months worked during the preceding calendar year and in accordance with the regulations hereinafter set forth.

(b) Vacation Allotment Schedule

(1) The vacation year shall be from January 1 to December 31.

(2) Paid vacation allowance will be computed on scheduled work days and based on the number of months worked in the preceding calendar year in accordance with the schedule below:

Less Than 14 Years' Service

Months of Service Prior to January 1	Vacation Allowance Work Days
1	1
2	2
3	3
4	4
5	4
6	5
7	6
8	7
9	8
10	9
11	9
12	10

All employees hereunder who prior to January 1, have completed fourteen (14) or more years of active service with the Company shall be eligible for an additional five (5) work days of vacation with pay during each calendar year thereafter, in accordance with the provisions of this Article. Vacation allowance for any such employee who is on pay status for less than twelve (12) calendar months in the preceding calendar year will be credited in accordance with the following schedule:

[fol. 41-43] 14 Years' or More Service

Months of Service Prior to January 1	Vacation Allowance Work Days
1	2
2	3
3	4
4	5
5	6
6	8
7	9
8	10
9	11
10	13
11	14
12	15

The maximum vacation allowance in no case will exceed fifteen (15) work days.

(c) Vacation allowance will accrue during each calendar month for which an employee receives pay for eighty-five (85) or more straight time hours from the Company, whether he is working or is on sick leave or vacation. An employee loaned to another company will accrue vacation credit during such loan period.

(d) An employee who has been with the Company at least one (1) year on January 1 may take his vacation at any time during the calendar year in which the vacation is due, subject to departmental vacation schedules and approval of his supervisor.

(e) An employee who has been with the Company less than one (1) year as of January 1 will be entitled to vacation with pay after January 1, computed in accordance with the schedule in (b) (2) above. However, in no case will a vacation be allowed to an employee until he has completed six (6) months of service with the Company.

(f) Compensation for the vacation period shall be computed at the employee's base rate of pay (including premium pay) in effect at the time the vacation is taken.

(g) If a holiday recognized in Article VIII (d) occurs during the employee's vacation period, he shall be paid at straight time for the day, in addition to his vacation period.

(h) Vacation leave is not cumulative and must be taken during the year following the year in which vacation is accrued, unless an employee has received written request [fol. 41-44] from his supervisor to forego his vacation during the year. Otherwise, if not taken within the calendar year when eligible, his vacation will be forfeited.

(i) An employee temporarily terminating because of lay-off due to reduction in force or an employee granted a leave of absence shall be given vacation pay based on the number of months worked in the preceding year in accordance with paragraph (b) (2), if vacation has not been taken in the current calendar year. Such employees shall also be paid vacation credit for the period worked during the current calendar year in accordance with the schedule set forth in paragraph (b) (2).

(j) An employee who is discharged or who resigns shall be paid for vacation due him, based on the number of months worked in the preceding year, in accordance with paragraph (b) (2), if vacation has not been taken during the current calendar year. Employees discharged for cause or resigning without giving at least two (2) calendar weeks' written notice shall not be paid vacation credit for any months worked in the current year.

(k) If an employee received written request from his supervisor to forego his vacation during a previous year and has not yet received that vacation, vacation pay will be paid for that year upon termination, regardless of reason for termination.

(l) An employee recalled from lay-off or returning from leave of absence will accrue vacation leave from the date of return to service in accordance with paragraph (b) (2), which vacation leave may be taken in the next calendar year.

(m) In the case of the death of an employee, any vacation pay allowance due him shall be paid to the executor, administrator, or legal heir.

(n) Request for vacation leave will be granted on a basis of seniority at the point. However, a senior employee will not be permitted to take vacation leave already assigned to a junior employee.

(o) A list indicating the number and classification of employees who may be on vacation at any given time during the year must be posted at each point by November 5 of each year. The Company will endeavor to schedule vacations during desirable periods to the extent such scheduling is permitted by operational requirements. Em- [fol. 41-45] ployees will have up to November 25 to choose vacation periods, and by December 5 vacation lists will be posted at each point. Employees shall be given their vacation pay prior to taking their vacation if they request the same by written notification to the appropriate Cost Accounting Department not less than two (2) weeks prior to the start of the vacation. Not more than eight (8) per cent of the employees at a point will be required to take a vacation during either January or February.

Article XVII

Sick Leave

(a) Employees who have completed six months of continuous service may be granted sick leave with pay according to the amount of sick leave allowance accrued at time of sickness.

(b) Sick leave allowance will accrue to employees at the rate of one (1) day for each month of continuous service and may accumulate to a maximum of sixty (60) work days if sickness does not require its use as accrued.

(c) Employees will not be eligible for sick leave benefits during the first six months of continuous service; however, sick leave credit will accrue during that period.

(d) Sick leave pay shall be at the employee's current straight-time rate.

(e) After a sickness, the number of days paid for will be charged against the allowance, and one (1) day of each month of continuous service shall again accrue to the employee until the accumulation again reaches sixty (60) days.

(f) Employees during the first three (3) years of employment shall not receive any sick leave pay for the first three (3) days of each illness.

(g) Employees will be required to present confirmation of sickness upon return to work, and the Company reserves the right to require a physician's certificate to confirm any sick claim in excess of three (3) days.

(h) It is the responsibility of any employee absent from work because of sickness to report immediately such absence and the reason therefor to his immediate superior, [fol. 41-46] or to the office or person designated by the Company.

(i) Sick leave allowance will accrue during each calendar month for which an employee receives pay for eighty-five (85) or more straight time hours, whether he is working or is on sick leave or vacation.

(j) The employees covered by this Agreement, and the Union, recognize an obligation to be truthful and honest and to prevent unnecessary absences and other abuses of sick leave privileges.

Article XVIII

Longevity

(a) All employees covered by this agreement will receive, for each year of completed employment spent in any of the classifications covered by this Agreement exclusive of the first three (3) years of employment, longevity of one (1) cent an hour for each year of continuous employment, to a maximum of ten (10) cents. The maximum of ten (10) cents will thus be reached at the end of thirteen (13) years of employment.

(b) Employees who now receive ten (10) cents or more longevity under former longevity plans will retain their longevity and will accrue no more.

(c) Employees presently receiving less than ten (10) cents longevity will retain their present longevity but will accrue no more until the scale in (a) above catches up. Thereafter, they will receive longevity based on the provisions of paragraph (a) of this article.

(d) Longevity accrued in any classification will be retained upon transfer or promotion to another classification. For the purpose of computing longevity credit, only pay seniority shall be counted.

Article XIX

Shift Premiums

(a) Employees shall be paid five (5) cents per hour and ten (10) cents per hour respectively for afternoon and night shifts as additional compensation over the rate paid on day shifts, for all hours worked.

(b) Any shift starting at twelve noon or later and before 6:00 p.m. shall be considered an afternoon shift; and any [fol. 41-47] shift starting at 6:00 p.m. or later and before 6:00 a.m. shall be considered a night shift.

(c) The Company and the Union may, at any point, change from fixed to rotating shifts or vice versa, by mutual agreement.

Article XX

Insurance Benefits

The present group sick and accident insurance plan, hospitalization plan, and any insurance benefits as in effect on the date of this Agreement shall not be altered or changed to the extent of decreasing the benefits or increasing the rates without conferring with the Union at least fifteen (15) days prior to the date of change.

Article XXI

Wage Rules

(a) The minimum hourly rates set forth on Schedule A attached hereto and made a part of this Agreement shall prevail on and after January 1, 1949, as to those employees covered by the Agreement who are on the payroll on the date this Agreement is signed.

(b) No employee shall suffer any reduction in hourly rate or classification as a result of this Agreement, and nothing in this Agreement shall be construed to prevent increases in individual rates or classifications over and above the minimum specified. This shall not be construed to prevent force reductions, demotions for cause, or other changes in classification and rate allowed in the Agreement.

(c) Employees shall be paid bi-weekly, every other Friday, except where applicable laws provide a more frequent paying-off condition.

(d) Should the regular pay day fall on a holiday or on days when the department or point is closed down, employees will be paid on the preceding day.

(e) Where there is a shortage equal to one-half a day's pay or more in the pay of an employee, the employee will be reimbursed for such shortage as soon as possible.

(f) Pay checks will include an itemized statement of all hours, wages, adjustments, and deductions for the pay period.

(g) Employees leaving the service of the Company will be paid for all time due upon request at the earliest possible [fol. 41-48] time after separation and in compliance with State Law.

(h) Any employee covered by this Agreement who is required to participate in test flights or to travel by Company plane in going to or returning from field service work shall be covered by a standard aviation accident insurance policy with a death benefit of $10,000 if he applies in accordance with Company regulations prior to take-off.

(i) Automatic changes in pay rate will be effective on the nearest date commencing a regular pay period.

Article XXII

Apprenticeship Program

In view of conditions now existing, it is believed undesirable to give consideration to the establishment of an apprentice mechanic program at the present time. Either party may request the other party at any time during the life of this agreement to discuss the establishing of an apprenticeship program, and by mutual agreement such a program may be established. No apprentice mechanics will be employed by the Company until such a program is established.

Article XXIII

General and Miscellaneous

(a) Should there be any change during the life of this Agreement in license requirements, all employees affected shall be given a reasonable length of time from the date of change to obtain such license without change in status or pay. Any qualified employee, upon request, shall be furnished with a certificate of eligibility by the Company for presentation to the proper government agency for procuring a CAA or FCC license.

(b) Employees who have grown old in the service of the Company and become unable to follow their regular work to advantage shall be given preference of such light work as they are able to handle in their work classification.

(c) Complete service records shall be maintained for all employees by the Company, and in case of discharge, the service record will, upon request, be made available to the [fol. 41-49] employee and his Union representative prior to the holding of any investigation of the discharge.

(d) An employee leaving the service of the Company will, upon request to the Industrial Relations Department, be furnished with a letter setting forth the individual's qualifications and length of service.

(e) If new equipment is put into service by the Company, affected employees shall be given every opportunity to become familiar with the new equipment without change of classification or rate.

(f) Except in the servicing of flights, no work shall be performed out of doors during inclement weather when shelter is reasonably available.

(g) All orders or notices to an employee under this Agreement, involving a change in station assignment, promotion, demotion, furlough, and leave of absence shall be given in writing.

(h) Foremen, assistant foremen, and higher ranking officials of the Company shall not be permitted to perform work on any hourly rated job covered by this Agreement except in emergencies or instruction or training of employees. It is agreed that the servicing of late flights where qualified personnel are not available, and the performance of necessary work caused by unusual circumstances at Line Service Stations in order to maintain flight schedules or the protection of Company property against the elements may be considered an emergency.

(i) Bulletin boards will be provided by the Company in the vicinity of each locker or dressing room assigned to employees or at locations mutually agreed upon, marked "International Association of Machinists," for posting notices restricted to:

(1) Notices of Union recreational and social affairs.
(2) Notices of Union elections.
(3) Notices of Union appointments and results of Union elections.
(4) Notices of Union meetings.

There shall be no general distribution or posting by employees of advertising or political matter or of any kind of literature upon the Company's property.

(j) The Company shall provide each employee covered by this Agreement with a copy of the Agreement printed

in a union shop and bound in a convenient pocket size booklet.

[fol. 41-50] (k) It is understood and agreed that the Company will not lock out any employee covered hereby, and the Union will not authorize or take part in any work stoppage, strike, or picketing of Company premises during the life of this Agreement, until the procedures for settling disputes involving employees covered by this Agreement and as provided by the Railway Labor Act have been exhausted. The Company reserves the right to discipline, including discharge of any employee taking part in any violation of this provision of the Agreement.

(l) No employee covered by this Agreement shall, during working hours, engage in solicitation of membership for any Union, collection of dues, or other Union activity not provided for in this Agreement.

Article XXIV

Saving Clause

Should any part or provision of this Agreement be rendered invalid by reason of any existing or subsequently enacted legislation, such invalidation of any part or provision of this Agreement shall not invalidate the remaining portions thereof, and they shall remain in full force and effect.

Article XXV

Geographical Scope of Agreement

(a) This Agreement shall not apply to personnel based outside the continental limits of the United States except to protect seniority as provided in Article VI of any employee who was employed in the United States and subsequently sent abroad. Such an employee shall be afforded protection in case of any grievance in the same manner or in a substantially similar manner to that provided in Articles XI and XII.

(b) Employees hired in the United States for overseas assignments shall not be covered by the terms of this Agreement and shall not accrue seniority.

(c) Employees transferred overseas shall, upon return to the United States, exercise seniority at the point and in the classification where they hold seniority.

Article XXVI

Effective Date and Duration

The hourly rates of pay set forth on Schedule A and the provisions of Article XVI which relate to employees [fol. 41-51] who have completed fourteen (14) years of service with the Company shall become effective January 1, 1949. All other provisions of this Agreement shall become effective as of March 22, 1949, and shall continue in full force and effect until December 31, 1949, and thereafter from year to year unless written notice by either party requesting renegotiation of all or any part of this Agreement shall be made, said notice to be served in accordance with the provisions of the Railway Labor Act, as amended.

Signed this 22nd day of March, 1949.

For International Association of Machinists, District 142: (s) Thos. E. Hansen, Jr., Cliff Miller, P. L. Packard, E. H. Kussman.

For International Association of Machinists: (s) Thos. E. Hansen, Jr.

For Transcontinental & Western Air, Inc., (s) D. W. Harris.

Schedule A

Classification	Minimum Hourly Rate of Pay
A. Mechanical Classifications	
Lead Inspector	$2.13
Inspector	
1st six months	1.91
2nd six months	1.97
Thereafter	2.03
Lead Mechanic	
1st six months	1.91
2nd six months	1.97
Thereafter	2.03
Master Mechanic	
1st six months	1.83

Classification	Minimum Hourly Rate of Pay
Thereafter	1.88
[fol. 41-52] Mechanic	
1st six months	$1.58
2nd six months	1.63
3rd six months	1.68
4th six months	1.73
Thereafter	1.78
Mechanic Helper	1.35
Lead Ground Service Helper	1.45
Ground Service Helper	
1st six months	1.15
2nd six months	1.20
3rd six months	1.25
4th six months	1.30
Thereafter	1.35
Lead Fleet Service Helper	1.35
Fleet Service Helper	
1st six months	1.05
2nd six months	1.10
3rd six months	1.15
4th six months	1.20
Thereafter	1.25
B. Stores Classifications	
Receiving Inspector	1.65
Lead Stores Clerk	1.60
Stores Clerk	
1st six months	1.10
2nd six months	1.20
3rd six months	1.25
4th six months	1.30
5th six months	1.35
6th six months	1.40
7th six months	1.45
Thereafter	1.50

Classification	Minimum Hourly Rate of Pay
C. Commissary Classifications	
Lead Commissary Clerk	1.35
[fol. 41-53] Commissary Clerk	
1st six months	$1.05
2nd six months	1.10
3rd six months	1.15
4th six months	1.20
Thereafter	1.25
Commissary Helper	
1st six months	1.00
Thereafter	1.05
D. Cargo Classifications	
Lead Cargo Agent	1.35
Cargo Agent	
1st six months	1.05
2nd six months	1.10
3rd six months	1.15
4th six months	1.20
Thereafter	1.25
E. Janitor Classifications	
Lead Janitor	1.15
Janitor	
1st six months	.90
2nd six months	.95
3rd six months	1.00
Thereafter	1.05

[fol. 42] DEFENDANT'S EXHIBIT 1

November 9, 1949.

Mr. J. H. Koppal,
1135 Troup,
Kansas City, Kansas

Dear Mr. Koppal:

In accordance with our conversation today, you are being suspended effective November 9, 1949. You are suspended for abusing the sick pay continuance plan.

In accordance with Article XI (b) (10) of the current TWA-IAM Agreement, you will be granted a hearing in the office of Mr. E. T. Huff, Kansas City Overhaul Base, on Friday November 11, 1949, at 9:30 a.m.

Yours very truly, Leslie D. Myers, Manager of Overhaul.

LDM:ft.
cc: C. E. Bowman, E. T. Huff.

[fol. 43] DEFENDANT'S EXHIBIT 2

TWA Interoffice Correspondence

To: Mr. L. D. Myers.
Address: Overhaul Base.
City: Kansas City, Kansas.
From: J. H. Koppal.
Address: Aircraft Shop.
City: Kansas City, Kansas.
Date: November 11, 1949.

Copies to:

Subject:

Effective at the end of my shift November 9, 1949, I hereby resign from the services of TWA.

Joseph H. Koppal.

[fol. 44] DEFENDANT'S EXHIBIT 3

Station—K. C., K.

Transcontinental & Western Air, Inc.

Employee's Notification of Absence

To Foreman in bldg., Department E. B. U. AOH.

This is to advise that information has been received concerning absence of an employee as follows:

Name—Koppal, Joseph.
Clock No.—49244.
Date due at work—11-8 ..M.
Time due at work—7:00 A.M.
Home Address—1135 Troup Ave.
Telephone—Fa. 9825.
Time left work (if early) .....M.
Can be reached at———.
Telephone ———.
Cause of disability—Toothache?
Length of disability———?
Will return to work ———.
Attending Physician—Dentist.
Wants Company doctor? ———.
Member of EMBP? ———.
Remarks: 10:30 Friday.
Date—11-8-49.
Time—10:30 ..M.
Signed—E. Swink, R.N.
Title ———.

(Printed in U.S.A.)

[fol. 45] **Narrative of Evidence**

Following is appellant's narrative of the evidence a taken from the transcript of the trial as prepared by th official Court Reporter, the original of which is on file wit the Clerk of the United States District Court for th Western District of Missouri.

Betty Koppal, a witness for the plaintiff, being dul sworn, testified that she was the wife of the plaintiff, an had lived at 1135 Troup, Kansas City, Kansas for a yea

and a half. The Koppal residence was on the second floor of a duplex, to which they had a private entrance. The Koppals had been married eleven years at the time of trial, and had two children, ages nine (9) and seven (7). (Tr. 3) The children lived with Mrs. Koppal at the above address, and attended school in Kansas City, Kansas. (Tr. 3-4)

During all of the time the Koppals lived in Kansas City, Kansas up to November of 1949, the plaintiff had been employed by the defendant T.W.A. The plaintiff worked from seven (7) in the morning to around three-thirty (3:30) in the afternoon. The Koppals generally rose in the morning at quarter to six; at which time the alarm was set. Their usual hour of retiring was eleven o'clock, sometimes earlier. (Tr. 4)

The plaintiff Joe Koppal arrived home from work on Monday, November 7th, 1949, about 4:00 P.M., and was ill that evening. The plaintiff told his wife that his stomach was upset. He had had dysentery ever since he came back from Arabia, and it wasn't unusual for him to feel that way. He said that his throat was feeling sore and all the signs of a cold along with it. He went to bed early that [fol. 46] night for that reason. The plaintiff took a dose of paregoric and a few aspirins that evening. (Tr. 6) He went to bed around 8:00 or 8:30 P.M. (Tr. 7)

On the morning of November 8, 1949, the alarm in the Koppal residence went off at the usual hour of quarter to six. The plaintiff told his wife that he felt so lousy that he didn't think he was going to make it that day. He told her the whole side of his face hurt, and they discussed the possibility of an infected tooth. The plaintiff used a heating pad on the side of his face, and stayed in bed instead of getting up that morning. He was still in bed when Mrs. Koppal left the house to go to the grocery store at 10:30 that morning. (Tr. 7)

Mrs. Koppal called the nurse at the T.W.A. Overhaul Base to report that the plaintiff would not work that day around 8:00 or 8:30 in the morning. The line was busy. About 10 or 10:30 in the morning Mrs. Koppal talked to the nurse (Tr. 7), and told her that her husband had a sore throat, that the side of his face hurt and they didn't know if it was a toothache or not. The nurse inquired if the

plaintiff was going to see a dentist. Mrs. Koppal told her that it depended on how he felt, and whether it got worse or better. (Tr. 8)

The remainder of the morning Mrs. Koppal went about her regular household duties, including getting the children off to school. Mrs. Koppal had to go to the school on that morning from 11:00 to 12:00, because she was a room mother for the second grade for an American Education Week observance program. (Tr. 8) Her household duties prevented her from calling the nurse at T.W.A. until she finally reached her on the telephone. (Tr. 9)

[fol. 47] Mrs. Koppal took the plaintiff's temperature on Tuesday morning November 8th, 1949, with a thermometer, and found that he had a temperature of a little over a hundred, which she took to mean that he had an infection of some kind. (Tr. 9)

Mrs. Koppal left the house at approximately 10 or 10:30 on that morning and was gone about 20 minutes to the grocery store. Upon her return, she was just in the house a few minutes to put down the groceries (Tr. 10) and then went to the Abbott School. She returned from the school a few minutes after twelve. Upon her return, a Mr. DeMattia and a Mr. Wilson were in the house with her husband. DeMattia had arrived as she was crossing the street on her way to the grocery store. She had told him to enter the house, and to yell as he did so because the plaintiff was home in bed. Both DeMattia and Wilson were studying for a T.W.A. flight engineer's examination, as was her husband. Mrs. Koppal had called Wilson and asked him to come over that morning, and DeMattia told her why he had come over. (Tr. 11-12-13)

Upon her return from the grocery store, the plaintiff got out of bed and was sitting in the living room talking to DeMattia. The plaintiff was dressed in a T-shirt, a pair of work pants and his slippers. Upon her return from the school the three men were sitting in the living room, where the plaintiff was holding a heating pad to his face. Mrs. Koppal asked the men to stay for lunch with them and they both accepted. (Tr. 14)

After lunch, somewhere around 1 or 1:30 P.M., DeMattia took Mrs. Koppal up to Minnesota Avenue and dropped her off there. Mrs. Koppal returned home about 2 or 2:30

[fol. 48] P.M., and found her husband alone and sort of dozing in a living room chair. (Tr. 15) The plaintiff went to bed early that night. (Tr. 16)

The following morning, November 9th, 1949, the alarm went off in the Koppal home at quarter to six in the morning. Mrs. Koppal asked the plaintiff how he felt, and he said that he still didn't feel well, but that since the T.W.A. man had called the day before he had better go to work. Mrs. Koppal urged him to stay home, but he would not. (Tr. 16)

Mrs. Koppal identified Defendant's Exhibit 1, as a copy of a letter her husband received on the Saturday, November 12th, following his hearing, November 11th, at which hearing her husband had been discharged. (Tr. 16-17)

It took the plaintiff ten weeks to find another job. His first job was as a foreman in a warehouse at which he made approximately $42.00 per week. He worked at the job for about three weeks. (Tr. 18-19)

At T.W.A. the plaintiff was paid every two weeks, and his check was for approximately $150.00. (Tr. 19)

Plaintiff's next job was at Davidson Furniture Company where he made a flat $50.00 per week. He worked there approximately one month. (Tr. 19-20)

Plaintiff was unemployed approximately two weeks, after which he went to work for Caldwell Associate in Independence, where he averaged with overtime about $70.00 per week. Plaintiff worked there until November of 1950, at which time he left to go to work in California at a better job where he would not lose his aircraft license. (Tr. 20)

[fol. 49] At the conclusion of the direct examination of Mrs. Koppal, defendant did not cross-examine the witness, and the witness was excused. (Tr. 22)

Joseph H. Koppal, the plaintiff, being duly sworn testified that at the time of trial he was living and working in California, although his wife and children were still living in Kansas City. (Tr. 23)

The plaintiff was thirty-three years old, and first went to work for T.W.A. on November 16, 1942. He worked for the defendant until November 9, 1949. (Tr. 23)

Plaintiff stated that in November of 1949 it was his intention to remain in the employ of T.W.A. and make his life's career with them. He held the position of master mechanic and was working in the engine build-up shop at that time. (Tr. 24) He had a license as an aircraft and engine mechanic. (Tr. 25)

Prior to November 8, 1949, plaintiff had been absent from his work at T.W.A. Overhaul base in Kansas City, Kansas on three or four other occasions in the year prior. When he returned from Arabia he had seizures of dysentery that demanded he stay at home, and on one occasion he had had an infected throat and a cold. The latter absence was about two weeks prior to November 8, and was reported to the company. On these occasions he had gone to the nurse's office and made out a form which allowed him to return to work and draw his pay. (Tr. 26)

In October and November of 1949, plaintiff had been preparing to take an examination for a flight engineer's job with T.W.A. which was a considerably better job than the [fol. 50] one he had. He was planning to take the examination on November 10th, 1949. (Tr. 26-27)

On the evening of November 7th, 1949, plaintiff was feeling bad when he finished his day's work at T.W.A. He felt bad all over, particularly in the side of his jaw and down in his throat. He told a couple of fellows about it, and one in particular whom he asked to come to his home and pick up his application the next day if he did not report to work. (Tr. 27-28)

Plaintiff continued to feel bad that evening and retired early around 8:00 P.M., which was earlier than his usual hour for going to bed. He took some digitalis that night, and woke in the morning at the usual time feeling worse. (Tr. 28) He stayed in bed, and his wife put some stuff on the side of his face and with a heating pad on his face he went back to sleep. He asked his wife to call and report to the defendant that he would be unable to report for work on that day. He stayed in bed until 10:30 or quarter to eleven that morning, at which time DeMattia came in and called to him through the door. He did not expect DeMattia to call at his home that morning, (Tr. 29) but he was expecting Joe Wilson to call because he had asked

him to the night before and his wife had called him that morning. (Tr. 30)

Plaintiff had a temperature on the morning of November 8th. His wife had taken his temperature with a thermometer. (Tr. 30)

Mr. Hicklin of T.W.A. called at plaintiff's house on the morning of November 8th. At the time Hicklin called, plaintiff was dressed in a T-shirt, pair of slacks, house slippers and no socks. (Tr. 30)

[fol. 51] DeMattia and Wilson were both at the Koppal home when Hicklin called. The doorbell rang and plaintiff went downstairs. Mr. Hicklin asked plaintiff how he felt, and plaintiff told him rotten. Hicklin asked plaintiff if he could make it to work that afternoon, and plaintiff said he didn't think so, that he didn't feel like it, and that if he had not felt badly he wouldn't have taken off. Plaintiff told Hicklin that he was having trouble with his jaw; that he didn't know if it was a tooth or an infection; that he had no intention of going to a dentist and something about not having transportation to go anyhow. (Tr. 31)

Mr. Hicklin did not say anything to the plaintiff about DeMattia or the flight engineer's examination. (Tr. 32)

Plaintiff talked to Wilson and DeMattia about the flight engineer's examination between the time they arrived about 10:30 or 11:00 A.M. until they left. It was a thing they all had in common. (Tr. 32)

Plaintiff did not leave the house on November 8th, and went to bed immediately after dinner that evening, around 7 or 7:30. (Tr. 32-33)

Mr. Koppal got up the next morning, November 9th, at his regular time about a quarter to six, but did not feel very well, although he felt a little better than he did the day before. He went to work at the usual time, and in the usual manner. He did not feel well after he was at work and about 9:00 or 10:00 o'clock sent over to the nurse who painted his throat and gave him some lozenges, after which plaintiff went back to work. (Tr. 33)

Plaintiff's foreman, Mr. Parker, did not say anything to him when he reported for work that morning, and except for going to the nurse nothing unusual happened during the [fol. 52] morning. (Tr. 34) In the afternoon, Mr. Parker

told the plaintiff that Mr. Myers wanted to see plaintiff in his office. Mr. Myers is the manager of the overhaul base. Plaintiff had never talked to him or been in his office prior to November 9th. Mr. Parker took plaintiff to Myer's office, where in addition to Myers, DeMattia, a shop steward named Grey and a Mr. Woodling were present (Tr. 35) Mr. Parker did not say why Mr. Myers wanted to see plaintiff. (Tr. 36)

Mr. Myers asked plaintiff if he was absent the day before and plaintiff told him he was absent because he had been ill. Plaintiff told Myers that DeMattia had been at his home and had arrived there about 10:30 or 11:00. Myers replied that that was strange because DeMattia had said that he had arrived around 12. Plaintiff told Myers that he had told him the time of DeMattia's arrival to his best knowledge. Myers continued to question plaintiff about DeMattia. (Tr. 36)

DeMattia had been a friend of plaintiff for six or seven years, and they had worked together quite a bit. (Tr. 37)

Myers asked plaintiff if he intended to put in a claim for sick pay, and plaintiff replied that he did. (Tr. 38) At the conclusion of the conference Mr. Myers said: "I think you are both a pair of big liars. I am going to suspend you, pending a hearing. We will decide when the hearing will be and you can step out in the hall and wait until we decide." Myers called them back in the room and wanted to have the hearing the next day. Plaintiff told him the flight engineer's examination was to be held the next day, so the hearing was set for the day after the examination. [fol. 53] (Tr. 39)

Myers said that he didn't think plaintiff was sick enough to take off from work: "I agree that you may have felt bad. We all feel bad once in a while, but that isn't any reason why you couldn't work." (Tr. 40)

After the conference in Myers' office, Myers and the plaintiff went over to the nurse, who took plaintiff's temperature and examined his throat in Myers' presence and then told Myers that plaintiff's throat was inflamed and that he had a slight temperature. (Tr. 40)

Myers then asked the nurse whether or not plaintiff was sick enough not to work. The nurse told Myers that

w-ether or not plaintiff was sick enough to work was a thing that plaintiff would have to feel himself. That plaintiff had a sore throat and a temperature, which although it was not very great showed plaintiff had infection. (Tr. 40-41)

Plaintiff was not familiar with the hearing procedure, but understood he had been suspended and was not to work pending the hearing. (Tr. 41-42) Plaintiff did not receive the written notice of his suspension until the day after the hearing. (Tr. 42)

The hearing was held in Myers' office on Friday, November 11th. Plaintiff had never attended a hearing before. He did not talk to Mr. Bowman, the union representative, prior to the hearing. (Tr. 43) Myers did not tell plaintiff prior to the hearing that his job was in jeopardy, or that he might be dismissed or discharged at the hearing. (Tr. 44) Neither Mr. Huff, Mr. Bowman, nor anyone else informed plaintiff he was liable to be discharged or dismissed at the hearing. (Tr. 44-45)

[fol. 54] Mr. Myers started the hearing with a long conversation about how plaintiff and DeMattia had abused their sick leave privilege and that if they wanted to come clean perhaps they could be a little more lenient with them. Plaintiff had nothing to come clean about. Plaintiff had told the truth. Whatever DeMattia had said was his testimony and not that of plaintiff. (Tr. 45)

Mr. Huff asked Koppal the same questions that had been asked by Mr. Myers about the time of DeMattia's arrival at his home. (Tr. 45-46) Mr. Myers called plaintiff a liar at the hearing, and plaintiff as a result lost his temper. (Tr. 46)

The hearing lasted until close to 3:00 o'clock. The hearing adjourned for lunch. The hearing was more or less a big formal chit-chat with the union discussing their problems with Mr. Huff and Mr. Myers. It seemed that that was more involved than the situation of DeMattia and plaintiff. A long discussion was held about policy. No one represented plaintiff at the hearing. The union was supposed to represent plaintiff, but plaintiff was not a member of the union at the time. (Tr. 46-57)

At the conclusion of the hearing Mr. Huff told plaintiff

"You will sign this paper saying you resign or I will discharge you as of now." Plaintiff wanted to sign it in a day or so; wanted some time to think it over. Plaintiff asked permission to sign the resignation under protest. Huff told plaintiff: "You will put nothing but your name on the paper, and that is it, or you will be discharged as of now." (Tr. 47)

DeMattia asked if the resignation would interfere with their taking the flight engineer's examination (Tr. 47), and Myers said that he saw no reason why it would. Plaintiff signed the resignation but told Huff he was signing it [fol. 55] under protest. The flight engineer's examination was the foremost thing in plaintiff's mind, and he thought he would get a chance to take it. (Tr. 48)

Plaintiff was not allowed to take the examination on the day it was originally scheduled, and was not allowed to take it after the hearing. (Tr. 49-50)

Plaintiff attempted to get another job by putting in his application with companies who had work relative to the thing he knew how to do, and through the State Employment Agency of Kansas, but could not get a job. After ten weeks he got a job as a warehouse foreman with the Cooke Company. (Tr. 50-51)

Plaintiff did not file a claim for sick pay on November 8, 1949, and was not paid by T.W.A. for that day. (Tr. 51)

Plaintiff worked for the A. C. Cooke Co. from January 20, 1950, to February 13, 1950, where he made $127.50. He next worked for the Davidson Furniture Company from March 2, 1950, to April 12, 1950, where he earned $300.00. His next job was at the Caldwell and Associates firm in Independence, where he worked from April 24th, 1950, to November 3rd, 1950, and earned $2,025.80. (Tr. 52) Plaintiff left the latter job because he had been offered a job in California that paid more, gave him a chance to hold on to his license. During all of the time after November 11, 1949, plaintiff attempted to secure employment in the airplane industry. Plaintiff went to work in California on November 16, 1950, for the Engineering Maintenance Company, (Tr. 53) and worked there four weeks, where he earned $280.60. He then went to work for Lockheed [fol. 56] Aircraft Company where to the date of trial he had earned about $900.00. (Tr. 54)

Plaintiff's rate of pay at T.W.A. at the time of his discharge was approximately $2.00 an hour. Plaintiff stated he averaged better than forty hours a week, around 44 hours. (Tr. 55)

Upon Cross-Examination, plaintiff stated that he had not known Mr. Huff prior to the hearing, and had not known Mr. Myers prior to the hearing. Plaintiff had not had prior trouble of any kind with anybody in T.W.A. (Tr. 56) and got along all right with everybody as far as he knew. Plaintiff knew he was covered by a union contract of some kind, (Tr. 57) but had never seen a copy of the contract and had not gone into it prior to November 9, 1949. Plaintiff did not know the members of the union grievance committee and was not familiar with their function. (Tr. 57-60) Plaintiff did not talk to Mr. Woodling after being suspended by Mr. Myers. (Tr. 61)

Plaintiff understood that the issue at the hearing was abuse of sick leave privileges on November 8, 1949, but thought the hearing was to be a little session. (Tr. 64)

After the hearing, he talked to Mr. Woodling about his rights under the contract. Mr. Woodling gave him a copy of the contract and drew a circle around part of it. Plaintiff asked who he should appeal to and was told it was in the book (Tr. 71). Plaintiff did not remember whether Mr. Woodling told him to go see Cliff Miller or whether someone else did. Plaintiff did not file a notice of appeal under the provisions of the union contract. (Tr. 72)

Plaintiff stated that he had referred to Joe Wilson as Mr. X, when his deposition was taken, (Tr. 76) and did not [fol. 57] mention Wilson's name at the hearing. He was not asked about Wilson, and did not want to involve him in the hearing. (Tr. 81) He had talked to Wilson between the time of his suspension and the hearing. (Tr. 84) He did not call Wilson or his wife to testify as to his condition on November 8th, because he did not think it necessary. (Tr. 85) Wilson arrived at Koppal's house around 10:30 or 11:00, and Hicklin arrived a little bit later, (Tr. 86). Wilson left Koppal's house between 1:00 and 1:30 or a little later. DeMattia left before Wilson did. (Tr. 87-88) The examination was discussed while they were there. (Tr. 88)

Plaintiff did not remember the name of the nurse he

visited, and did not sign a piece of paper in the First Aid Station when he went in there. (Tr. 88)

Plaintiff said that in his deposition he testified that he did not know the exact time Hicklin arrived at his home, but that he thought it was around 12 or 12:30. (Tr. 99-100)

On Re-direct examination, plaintiff identified plaintiff's Exhibit D(1) and D(2) as the original copy of the notice of his suspension, and the envelope in which it was delivered to him, and stated that the postmark date was November 10, 1949. (Tr. 109-110)

Plaintiff told both Myers, (at the conference in his office) and Huff, (at the hearing) that Hicklin arrived at his home around 10:30 to 11:00 o'clock. This was also Hicklin's testimony at the hearing. (Tr. 111) In his deposition plaintiff fixed this time, and also the time of DeMattia's arrival around the noon hour. (Tr. 112-113)

[fol. 58] Plaintiff did not bring witnesses to the hearing because after Myers had suspended him, Myers had seen the nurse examine him, and had heard the nurse say that plaintiff was ill. (Tr. 113)

The hearing seemed cut and dried. (Tr. 113) It was mostly a lot of conversation back and forth with people that did not involve me. Mr. Myers was the first to make a statement at the hearing, and it was quite lengthy. (Tr. 115) Mr. Huff asked plaintiff if he wanted to come clean at the beginning after Myers had given his testimony. (Tr. 115) Plaintiff had done nothing wrong and had no confession to make. (Tr. 116)

Mr. Huff's decision after the hearing was quite a shock to plaintiff, who had no idea that anything like that would take place. Afterward he tried to do something about reinstatement and saw several company officials, who seemed anxious to help him up to a certain point, and then plaintiff heard no more from them. He couldn't spend too much time at it away from trying to find work. He spent ten weeks trying to find employment, including Christmas time, which was a miserable one. When he did find work it didn't bring enough to keep up with the bills. Plaintiff lost his automobile. He did the best he could, but just couldn't make it. Plaintiff's wife went to work, which helped a lot to feed them. (Tr. 118) Plaintiff's wife was

working at the time of trial. Plaintiff was required to borrow money, and his lack of funds, inability to secure employment and support his wife and children caused him worry and mental distress. (Tr. 118-119).

In the latter part of October and the early part of November 1949, the company was trying to reduce absenteeism at the Overhaul Base. (Tr. 120)

[fol. 59] On Re-Cross-Examination, plaintiff stated that no one at the hearing was sworn; that it was a very informal hearing. (Tr. 121)

In response to questions from the Court, the plaintiff stated that he had an opportunity at the hearing to talk and tell about his illness; that he told them everything about what transpired, except that he did not say Mr. Wilson was there; that it was not asked of him and he did not mention it. Plaintiff further said that there was no evidence at the hearing to the effect that he was not ill on November 8th, 1949. That Hicklin testified at the hearing that he called and that plaintiff answered the door and related the conversation with plaintiff and then left the hearing. (Tr. 123-123)

Dr. W. W. Gist, a medical doctor testified for the plaintiff concerning the medical phase of the plaintiff's case, but which testimony was not included in the transcript, and is not material to this appeal.

Plaintiff rests:

[fol. 60] Thereupon, the defendant presented to the Court its Motion for Directed Verdict, which was by the Court overruled, and which Motion for Directed Verdict is as follows:

MOTION FOR DIRECTED VERDICT—Filed March 8, 1951

At the close of plaintiff's evidence defendant moves the Court to instruct the jury that under the pleadings and the evidence, plaintiff cannot recover against defendant and their verdict must be in favor of defendant.

[File endorsement omitted.]

[fol. 61] NOTE RE DEFENDANT'S TESTIMONY

The testimony of the witnesses for the defendant have been omitted from plaintiff's narration of the evidence for the reason that they are not deemed necessary for the Court to decide the issues raised on this appeal.

The following witnesses testified in behalf of defendant:

1. L. D. Myers, Manager—Overhaul Base.
2. Cliff Miller, General Chairman, District 2—International Association of Machinists.
3. C. F. Woodling, Regional Director, Industrial Relations.
4. F. M. Hicklin, Personnel Administrator.
5. C. E. Bowman, Inspector and Union Grievance Representative.
6. E. T. Huff, Line Maintenance Manager, and the Hearing Officer of the Defendant.
7. Carl G. Johnson, Payroll Department.
8. Joseph L. Wilson, Flight Engineer.
9. Edna Swink, Nurse (Deposition read into evidence).

The testimony of defendant's witnesses generally supported defendant's theory that plaintiff had abused the sick leave provisions of the collective bargaining agreement, and had been given a fair hearing. Defendant's evidence also corroborated the fact that plaintiff had not taken an appeal to within ten days after the hearing as provided in the bargaining agreement.

Defendant rests.

[fol. 62] IN UNITED STATES DISTRICT COURT

Thereupon, the defendant presented to the Court its Motion for Directed Verdict at the Close of All the Evidence, which Motion was by the Court overruled, and which Motion for Directed Verdict at the Close of All The Evidence is as follows:

MOTION FOR DIRECTED VERDICT—Filed March 9, 1951

At the close of all the evidence, defendant moves the Court to instruct the jury that under the pleadings and the

evidence plaintiff cannot recover against defendant, and their verdict must be in favor of defendant.

[File endorsement omitted.]

[fol. 63] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUESTED INSTRUCTIONS—Filed March 9, 1951

Thereupon, the plaintiff presented to the Court his requested instructions, among which was his requested instruction on measure of damages, which was by the Court refused, and which requested instruction is as follows:

The Court instructs the jury that if you find for the plaintiff you will assess his compensatory damages in the amount that would have been paid to the plaintiff, if he had continued to work for the defendant from the date of his discharge to March 7, 1951, at the rate of pay he was receiving at the time of his discharge, after allowing credit for any amounts which the evidence shows the plaintiff earned from other employers during said time and for such further amount as will compensate the plaintiff for his mental suffering, if any, caused by his wrongful discharge by the defendant.

The Court further instructs the jury that if you find for the plaintiff and shall further find from the evidence that the acts and things done by the defendant were willfully and maliciously done, then, in addition to the actual damages sustained by him, the jury may assess against the defendant by way of punishment for such wrongful act, exemplary or punitive damages in such sums that may seem fit and proper, not to exceed the sum of $15,000.00. The word "maliciously" as used in the above instruction does not mean hatred, spite or ill will as commonly understood, but means a wrongful act intentionally done without just cause or excuse, and by the word "willful" is meant intentionally and not by accident or mistake.

[fol. 64] The Court further instructs the jury that if you find for compensatory and punitive damages, you will state the amount and kind of damages so found by you separately

in your verdict, but you cannot find punitive damages without first finding compensatory damages in your verdict.

[File endorsement omitted.]

[fol. 65] In United States District Court

Court's Charge to Jury

The Court: Now, ladies and gentlemen, you have heard all of the evidence in the case and the arguments of counsel, and I say to you that they have very well presented the facts and issues in this case to you. So much do I believe so that I don't think it is necessary for the Court to exercise the prerogative that it does have to comment upon the evidence in this case, so as to lead you to a just conclusion and verdict in the case. You undoubtedly have very clearly in mind all of the evidence and the arguments that have recently been made.

It will be, however, necessary for me at times to advert to some of the testimony in a general sort of a way so as to make it clear to you what the actual issues in this case are that you might better understand them and thereby make a practical application of the facts to the law of the case and render your verdict accordingly.

Now, understand this: that it is your sole prerogative in this case, as in all jury cases, to decide the facts of the case, and the judge upon the bench must not encroach upon the prerogative of the jury in that respect. I wouldn't attempt to do so, and you must not understand, if I do comment upon the evidence in this case, that I am expressing to you any opinion that you should follow and be governed accordingly. You are left to reach your own conclusion from the facts of the case and render your verdict accordingly.

[fol. 66] Just as it is not my prerogative to encroach upon your duties to pass upon the facts of the case, you are bound by the law as I declare it, and you must follow the law as I declare it and even though you have some rule of law in mind that you think might be applicable to the facts of this case, and decisive in the case, you cannot take that rule of law in to consideration in arriving at your verdict

and do justice between these parties, because I shall declare the law to you and you are bound to follow the law as I declare it.

Now, this *is* a rather unusual case, but is an important case. It is an important case not only from the plaintiff's standpoint, but from the defendant's standpoint, so it does merit your serious consideration, and I am sure that you will give that to it.

Under the provisions of the bargaining agreement that the defendant had with the National Association of Machinists governing the working conditions of the mechanics and related employees in the service of the defendant, the defendant had the duty to plaintiff, and its other employees, not to unjustly discharge any of those employees, and before discharging an employee who had been in service of the company for more than 90 days, to grant to such employee a fair hearing before some designated representative of the company other than the one bringing the charge against the employee, relative to the nature of the precise charge made against the employee, and to give the employee written notice of the charge, and an opportunity to secure the presence of witnesses at the [fol. 67] hearing, and to be present at the hearing to make necessary defense to any charge made against him.

Now, that is the provision of the bargaining agreement in question which the plaintiff contends in this case that the defendant has violated. It is the plaintiff's claim in this action that he was forced to resign and, therefore, discharged from his employment with the defendant company, and if you find and believe from the evidence in this case that the defendant was forced to resign and that he did not voluntarily resign of his own free will, then the fact that he signed a resignation is tantamount and the same as a discharge. So you may consider the fact of his resignation under protest as a discharge in this case. But if he voluntarily resigned of his own free will, and you find that to be the fact, then that ends this case and your verdict should be returned for the defendant. But if he was forced to resign and, therefore, discharged from his employment with the company in violation of the provision of the bargaining agreement that I just read to you, then it is plain-

tiff's claim that he was not given a written notice of the charges made against him before the hearing resulting in his discharge was held, and that he was not afforded a fair and impartial hearing on such charge.

Therefore, one of the issues for you to settle in this case by your verdict is whether the defendant granted to plaintiff a fair hearing of the charges made against him in accordance with the provisions of the bargaining agreement referred to in the evidence. Under the law the right to a fair hearing pursuant to the provisions of that bargaining agreement included the right to be apprized in writing of the [fol. 68] nature of the charge made against an employee and the right to be confronted with witnesses and to be present and give testimony in person and by witnesses in defense of any charge made against an employee.

A fair hearing within the meaning of the purview of that agreement does not contemplate one conducted according to the rules of evidence and of procedure applicable to a judicial proceeding, or that any particular form of procedure be strictly followed by the executives of the company conducting the hearing, or that the witnesses give testimony at such a hearing under oath to tell the truth, to testify as they would in a court of justice.

The fair hearing that I refer to and that is contemplated in the bargaining agreement in question contemplates a meeting that would be called before an executive officer of the defendant company other than one preferring charges against an employee, at which the employee against whom the charge had been made would be apprized of the nature of the charge made against him in writing and be permitted to appear and hear evidence on such charge, and be afforded a full opportunity to tell his side of the facts relating to any charge made against him.

In other words, it was a meeting or a hearing such as might be comprehended to be held in any business organization where an employee is charged with misconduct, and he is brought before an executive officer of the company to defend the charge made against him, and he is afforded an opportunity to hear the nature, character, and extent of the charge, and, in turn, given an unfettered opportunity [fol. 69] to testify in his behalf, and where all the facts pertaining to the charge made against him would be aired

and discussed in a full, open, and informal manner before a decision on the merits of the charge was reached by the executive officer conducting the hearing.

Now, one fact relied upon by the plaintiff to establish that he was not given a fair hearing on the charge made against him is that he was not given written notice of the nature of such charge prior to the time of the hearing in question, as provided in the bargaining agreement. Under the law, if plaintiff was not given written notice of the nature and character of the charge made against him, prior to the time of the hearing in question, and the plaintiff was required to attend said hearing ignorant and uninformed of the nature and character of the charge he would be required to defend before Mr. Huff, and the plaintiff was ignorant of the purpose of that meeting, and if plaintiff was not afforded an opportunity to have witnesses present at the hearing to testify in his behalf, then a hearing so held without such a written notice being given to the plaintiff would make the hearing in qrestion unfair, and it would be an unfair termination of the plaintiff's employment, if he was discharged at a hearing so held.

However, notwithstanding the provisions of the bargaining agreement in question, providing for the written notice to be given to an employee as to the nature of the charge made against him, if an employee has full knowledge of the nature, character and extent of the charge made against [fol. 70] him, from any source, and is sufficiently informed in advance of the time of the hearing to be held thereon by an executive of the company, other than the one making the charge against the employee, and being so informed and with such knowledge the employee attends a hearing without demanding written notice of the precise charge that may be made against him and a hearing is held at which the testimony is given in support of the charge and the employee is given an opportunity to defend the charge made against him, then the employee would under the law be deemed to have waived the provision of the bargaining agreement relating to the giving of written notice.

Therefore, if you find and believe from the evidence that at the time plaintiff attended the hearing before Mr. Huff plaintiff did not have served upon him a full written statement of the precise charges made against him, and that the

plaintiff was ignorant of the charges so made against him and the purpose of the meeting at the time he attended the meeting before Mr. Huff, and that the plaintiff did not know that he could have witnesses at that meeting, if you find those facts to be, then you should find the issue upon an unfair hearing in favor of the plaintiff.

However, if you find and believe from the evidence that at the time plaintiff attended the hearing before Mr. Huff plaintiff had full knowledge of the nature and character of the charge made against him by Mr. Myers, and that the plaintiff knew that he could, if he desired, have witnesses present at that hearing to give testimony in his behalf, and at the hearing which plaintiff so attended testimony was [fol. 71] given in support of the charge made against him, and plaintiff was given an opportunity to and did make a defense to that charge, then you are instructed that; even though you may find and believe from the evidence that the plaintiff was not given written notice of the charge and hearing in question as provided in the bargaining agreement, that fact, standing alone, would not, in and of itself, be sufficient cause for you to find that the hearing in question was an unfair one.

Under such circumstances, plaintiff having attended said hearing with full knowledge of the nature, character and extent of the charge made against him, and his right to have witnesses present at said hearing, and having been afforded an opportunity to testify on his own behalf and make a defense to the charge, plaintiff would be deemed to have waived the requirement for formal written notice, as provided in the bargaining agreement, and under such circumstances you could not find that the hearing was an unfair one, merely because of the failure, if so, on the part of the defendant to give plaintiff written notice before the hearing as provided in the bargaining agreement.

Now, on that issue you will recall the testimony of the various parties, of the plaintiff with reference to the fact that he testified that no notice was given to him prior to the time of the hearing in question, that is, no written notice was given to him. The testimony of Mr. Myers was that the notice was delivered to the plaintiff in the case on the 10th of November, the day before the hearing. However, there is testimony in the case from the plaintiff, himself,

[fol. 72] that at the time he attended the hearing, as I recall the testimony, plaintiff said that he knew that he had a right to have witnesses present at the meeting and he knew the nature and character of the charge that was made against him and the purpose of the meeting, but that he merely assumed that it was a "scare" hearing that was being held.

If the plaintiff, under the testimony, that testimony or any of the other testimony in the case, as you may consider it, had knowledge, full knowledge of the nature and character of the hearing and of the purpose thereof, and the opportunity to defend himself at that hearing, then the defendant would not be charged with having conducted an unfair hearing under the failure to give notice.

But if the plaintiff, as I have said to you, attended the hearing ignorant of the nature and purpose of the hearing and the charge made against him, and that he did not know that he had a right to defend himself there against discharge, then of course, the hearing would be an unfair one.

Now, another fact relied upon by plaintiff in this case to establish that a fair hearing was not granted to him under the bargaining agreement is that the plaintiff contends that at the hearing in question no substantial evidence was offered before Mr. Huff that would warrant a reasonably prudent person under the circumstances to believe and find that the plaintiff had attempted to abuse the sick leave provisions of the bargaining agreement in question. Under the bargaining agreement, sick leave with pay could be ac- [fol. 73] cumulated by employees of the defendant company under certain conditions. The conditions under which the sick leave was accumulated are not presently pertinent to your inquiry, but by the provisions of that sick leave privilege contained in the bargaining agreement the defendant could require employees to present confirmation of sickness upon their return to work, and employees absent from work because of sickness were required to report immediately upon such absence and the reason therefor to their immediate superior, or some other officer or person designated by the company, and it was provided that the employees covered by said agreement recognized an obligation to be truthful and honest and to prevent unnecessary absences and other abuses of sick leave provisions.

Under the law an employee of defendant company who might make a report to the company that he was sick and unable to report for work at a time when such employee was not, in truth and in fact, sick and unable to report for work, but remained away from his duties in the service of the defendant for some other and unnecessary reason, that would be held to be a violation of the provisions of the bargaining agreement with reference to sick leave, and would be an abuse of the sick leave provisions provided in the bargaining agreement in question.

Now, with that thought in mind, you will recall that under Exhibit notice No. 1, which defendant claimed was delivered to the plaintiff prior to the time of the hearing in question, which the plaintiff denied that he received prior to the hear- [fol. 74] ing, nevertheless in that notice it is stated, among other things, that the charge made against the plaintiff was an abuse of sick leave privileges of the bargaining agreement in question, therefore a fair hearing on that charge presupposes that some substantial evidence of that fact be adduced before the executive of the defendant company hearing such charge, from which the truth of that fact could be reasonably inferred by a person of ordinary prudence.

Substantial evidence in that respect would mean evidence that is relevant to the charge made against an employee and would exclude vague, uncertain, and irrelevant matters. Substantial evidence of a charge made against an employee before an executive officer implies a quality of proof which induces conviction and makes an impression on the reason of a person of ordinary prudence. It means that one weighing the evidence takes into consideration all of the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom, and when the evidence is so considered in its entirety in relation to the charge made, the executive presiding at such a hearing could deduce therefrom a fixed conviction concerning the truth or falsity of the charge.

Therefore, in respect to the contention made by the plaintiff that there was no substantial evidence before Mr. Huff that plaintiff was not actually sick on the 8th day of November, and unable to report for work, and that as a con-

sequence thereof there was no evidence that plaintiff was guilty of attempting to abuse the sick leave privileges provided in the bargaining agreement, and that the plain- [fol. 75] tiff did not make an honest and truthful report to the company of his physical condition on that day, as found by Mr. Huff, you are instructed that you must weigh and consider the evidence from the standpoint not only of the truth or falsity of the fact, whether plaintiff was or was not sick and unable to report, but also from the standpoint of whether there was introduced at that hearing before Mr. Huff substantial evidence sustaining the charge made against the plaintiff before he was discharged.

By that is meant that a fair hearing, within the purview of the bargaining agreement, is satisfied if there is substantial evidence introduced before the executive of the company hearing the charge, which would lead a reasonably prudent person to the conclusion that was reached by Mr. Huff. The question to be resolved in that respect is not only a determination of the fact that the charge made against the plaintiff was true, but whether there was sufficient evidence before Mr. Huff from which he might conclude and determine that the charge was true.

In other words, if Mr. Huff had substantial evidence before him to conclude that the plaintiff had not honestly and truthfully reported to the company that he was ill on November 8th, and the evidence that was heard by Mr. Huff was such as would lead an ordinarily prudent person to that conclusion, then regardless of the fact of whether Mr. Huff rightly or wrongly decided that fact, the jury would be bound by the conclusion reached by Mr. Huff in that respect, and it could not substitute its judgment for that of Mr. Huff [fol. 76] as to the correctness of the conclusion reached by him.

However, if Mr. Huff reached the conclusion which he did at a time when he had no substantial evidence before him such as a reasonably prudent person would not have relied upon to form a conclusion such as Mr. Huff did form at the conclusion of that hearing, or during that hearing, and Mr. Huff had reached the conclusion that he did from irrelevant and extraneous matters, or from bias and prejudice, or capriciousness on his part, then the decision so reached by

Mr. Huff would not constitute a fair decision reached by a fair hearing as provided in the bargaining agreement in question, and under those circumstances the decision of Mr. Huff would not be binding upon the jury.

Therefore, in determining whether plaintiff was afforded a fair hearing before Mr. Huff, you should consider the testimony as to what transpired at that hearing and the statements and the testimony given from the standpoint of determining whether there was any substantial evidence given at the hearing before Mr. Huff that would tend to sustain the charge made against Mr. Koppal by Mr. Myers. If you find and believe from the evidence that there was no substantial evidence at that hearing to sustain the charge made against Mr. Koppal by Mr. Myers, and that the decision reached by Mr. Huff was an unfair one, in that it was not supported by substantial evidence, or was the result of considering irrelevant and prejudicial matters, then you should resolve the issue as to whether plaintiff had a fair or unfair hearing in favor of the contention of the plaintiff. [fol. 77] On the other hand, if you find and believe from the evidence that there was some substantial evidence given at the hearing before Mr. Huff that tended to sustain the charge made against Mr. Koppal by Mr. Myers, and that from the evidence so given an ordinarily prudent person, after hearing the same, could and would have concluded that the charges made against plaintiff by Mr. Myers were true, and that upon the evidence so given Mr. Huff made a finding, then you are instructed that, even though you may find and believe from the evidence that the charges made against the plaintiff were not proven as sufficiently as they might have been, or that the decision reached by Mr. Huff was not a correct one, or that you as jurors might have reached a different decision than Mr. Huff did, still you cannot put yourself in the place of Mr. Huff and say that plaintiff was not granted a fair hearing on the charge made against him.

In other words, if there was substantial evidence given at the hearing before Mr. Huff from which it could be found by a person of ordinary prudence that the charges made against Mr. Koppal were true, then regardless of what you might think of the decision reached by Mr. Huff,

you cannot under the law find that plaintiff was not afforded a fair hearing for, right or wrong as the decision of Mr. Huff may have been, if there was testimony of a substantial character sustaining the charge, then the decision of Mr. Huff would be final and conclusive upon the parties, and you would under those circumstances be compelled to find the issue of unfair hearing against the contention of the plaintiff and in favor of the defendant.

[fol. 78] If you find and believe from the evidence that in conducting the hearing in question defendant acted in good faith and complied with all of the provisions and requirements of the contract and bargaining agreement in question with respect to the hearing to be granted to the plaintiff, and that the hearing was a full, open, and fair one, conducted in accordance with that bargaining agreement, then your verdict should be for the defendant even though you believe the defendant, its representatives and officers, erred in concluding that plaintiff should be discharged or allowed to resign.

On the other hand, if you find and believe from the evidence that the plaintiff was not afforded a fair and full hearing before Mr. Huff, and that there was no substantial evidence introduced thereat to sustain the charge made against the plaintiff, and if you further find from the evidence that the plaintiff was, in fact, sick and unable to report for work on November 8th, then your verdict should be in favor of the plaintiff and against the defendant on the issue of unfair hearing.

Now, if you find the issues in favor of the plaintiff and against the defendant, then you should assess the plaintiff's damages in this action in such sum as you find and believe from the evidence will reasonably compensate the plaintiff for all damages sustained by him as a result of his unlawful discharge, if so, from employment by the defendant. In that connection you may take into consideration the loss of [fol. 79] earnings plaintiff sustained from the time of his discharge for a reasonable period of time thereafter in which plaintiff, in a good faith endeavor, was able to obtain employment of a comparable type and character such as he performed for defendant while in its employ. In that connection, the evidence establishes that plaintiff did find com-

parable employment with the Engineer Maintenance Company, in Los Angeles, California, on November 16, 1950; so the loss of earnings recoverable by the plaintiff in this action, if any, would be from the time of his discharge to November 16, 1950.

In computing the amount thereof you should give to the defendant credit for any sums earned by plaintiff from any and all employment during the period from the time of his discharge until November 16, 1950. In addition to loss of earnings plaintiff may have sustained, you may take into consideration the mental anxiety, if any, resulting from worrying by the plaintiff over his economic condition, sustained by him by reason of his discharge, and from the time of his discharge until he found employment of a comparable type and character.

You may also take into consideration the reasonable value which you find and believe from all of the evidence of any benefits plaintiff may be entitled to under the bargaining agreement in question, such as seniority rights, vacation pay, transportation rights, longevity rights, and insurance rights and allow to plaintiff therefor such sum as you find and believe from the evidence will be reasonable compensation to him; not to exceed, however, as counsel stated to you, the sum of $7500, and in so stating the Court [fol. 80] does not mean to imply that you should find for plaintiff in this sum, or any sum, but that is merely to inform you of the highest amount to which you can return a verdict in this case in favor of plaintiff, if you do return a verdict in favor of plaintiff.

Under the law of this case, as in all other cases, the burden of proof is upon the plaintiff to establish by a preponderance of all of the credible evidence in the case each and every fact necessary to a recovery by the plaintiff such as I have stated to you in this charge. If the plaintiff has sustained that burden of proof, then you should return a verdict in favor of plaintiff. If you find that the plaintiff has not sustained that burden of proof, and that he has not proven by a preponderance of all of the credible evidence each of the facts that I have related to you, then your verdict should be in favor of the defendant.

If your verdict is in favor of plaintiff, you must return

it in one lump sum in such an amount as will reasonably compensate plaintiff for all damages sustained by him by reason of his unlawful, if so, discharge from defendant's employment.

You are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony. In considering the testimony of a witness you should take into consideration his conduct and appearance upon the stand, the interest of the witness, if any, in the results of the trial, the motives actuating the witness in testifying, the opportunity which the witness had to observe and be informed regarding the matters as to which he gave testi- [fol. 81] mony, his inclination to speak truthfully or otherwise regarding those matters. Taking all of those matters into account, it is your province to give to the testimony of each witness such weight and value as you deem proper. If upon a consideration of all of the evidence in the case you find that any witness has wilfully sworn falsely as to any material fact in the case, then you may reject or treat as untrue the whole or any part of such witness's testimony.

Your verdict in this case must be predicated upon the facts as you have heard them here in court. You cannot speculate or conjecture with reference to any fact not based upon testimony in this case under the credible evidence.

The Court has prepared a form of verdict for you. If you should find the issues in this case in favor of the defendant, then your verdict should be, "We, the jury in the above-entitled cause, find the issue for the defendant," and your foreman merely signs that verdict. But if your verdict is in favor of the plaintiff, then it would read, "We, the jury in the above-entitled cause, find the issues in favor of the plaintiff and against the defendant, and assess the plaintiff's damages in the sum of $——." Your foreman would insert in this space the amount of damages that you find in favor of the plaintiff, if you do find in favor of the plaintiff by reason of any unlawful discharge, and after that figure is inserted the verdict will be signed by your foreman.

All of you must agree upon a verdict, that is, every juror must agree upon the verdict, whether for the plaintiff or the defendant in this case.

[fol. 82] Are there any exceptions to the charge?

(Whereupon, the following proceedings were had out of the hearing of the jury:)

COLLOQUY BETWEEN COURT AND COUNCIL

Mr. Freel: Plaintiff requests that the Court further instruct the jury that the testimony of the witness Wilson, off behalf of the defendant, be disregarded in considering whether or not the plaintiff was given a fair hearing and in considering the issue of substantial evidence before the hearing also.

The Court: I can't do that. Anything else?

Mr. Freel: That is the only additional request I had, because I thought there might be some confusion on that point.

We take an exception to the ruling and refusal of the Court to give that instruction.

We further take exception to the failure of the Court to give Plaintiff's Instructions No. 1, 2, and 3, as requested by the plaintiff, and further object and except to the measure of damages instruction as given by the Court for the reason that damages for loss of earnings on the part of the plaintiff were restricted to the time after discharge in which the plaintiff was unable to obtain other employment, which is not the true nature of damages.

Mr. Warner: The defendant excepts to the Court's refusal to give directed verdict, as requested by defendant.

The Court: Your exception is that respect is saved as [fol. 83] a matter of course.

(Whereupon, the further following proceedings were had in the hearing of the jury:)

The Court: Ladies and gentlemen, you will retire to your jury room and consider your verdict.

(Whereupon, the court stood at recess, awaiting the verdict of the jury.)

(Thereafter, and at the hour of 11:30 a.m., of the following day, Saturday, March 10, 1951, the following proceed-

ings were had in court chambers, out of the presence of the jury:)

The Court: Let the record show that, after the charge was given and exceptions were stated by plaintiff, the Court understood that the only matter that counsel for defendant desired to discuss with the court was the question of whether or not defendant's motion for a directed verdict might be filed, and whether it was necessary for exception to be saved to the overruling thereof, and that the Court indicated to counsel that his exceptions to refusal to grant the motion for directed verdict were saved as of course.

Counsel now informs the Court that he intended to make additional exceptions to the charge, and that he was not given an opportunity to do so by the Court. The Court is now giving him an opportunity to state his exceptions to the charge, out of the hearing of the jury, and after the jury has retired and has partially considered its verdict in the case.

[fol. 84] Mr. Freel: Let the record show that the defendant's exceptions to the instructions of the Court are being taken and made at 11:30 on the morning of March 10, 1951, and that defendant's exceptions should have been taken before the jury retired for its deliberation in this cause on the evening of March 9, 1951, and that defendant's counsel is making his exceptions to the Court's instructions from notes which indicates that he has given some thought and study to said exceptions, and to the Court's charge, during the time between when the jury retired and the time the exceptions are being made, and that said exceptions are being made over the objection of council for the plaintiff.

The Court: All right, go ahead, Mr. Warner.

Mr. Warner: I object to that part of the Court's charge which states that the plaintiff could not be discharged from the employ of the defendant without just cause, because such is an incorrect construction of the contract here involved.

Secondly, I object to the submission to the jury of the question as to whether or not the plaintiff had notice of the precise charge against him, because the plaintiff by his own admission in the testimony in the cause admitted that he knew the precise charge before the hearing commenced.

[fol. 85] And thereafter on March 10, 1951, the jury returned its verdict into Court in favor of plaintiff in the sum of $7500.00.

IN UNITED STATES DISTRICT COURT

VERDICT—March 10, 1951

We, the jury in the above entitled cause find the issues in favor of the plaintiff and against the defendant and assess plaintiff's damages in the sum of $7500.00.

Richard C. Cameron, Foreman of the Jury.

[File endorsement omitted.]

[fol. 86] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO HAVE THE VERDICT AND JUDGMENT SET ASIDE AND TO HAVE JUDGMENT ENTERED IN ACCORDANCE WITH ITS MOTION FOR A DIRECTED VERDICT

and

MOTION FOR NEW TRIAL—Filed March 19, 1951

I

Defendant moves the Court to set aside the verdict and judgment entered thereon in the above-entitled cause on March 10, 1951, and to enter judgment in accordance with defendant's motion for directed verdict, and for grounds therefor states as follows:

The motion for a directed verdict should have been granted because:

1. There was no substantial evidence to support the verdict.

2. There was no evidence that plaintiff was not given a fair hearing by the defendant in accordance with the provisions of the contract in evidence.

3. The evidence in the case shows conclusively that there was substantial evidence to support the decision of defendant's hearing officer, Mr. Huff.

4. The Court does not have jurisdiction over this action because, under Missouri decisions, plaintiff cannot recover compensatory damages for mental pain [fol. 87] and suffering for breach of a contract of employment, and plaintiff's testimony as to his earnings shows that there was less than $3,000.00 in controversy.

5. The evidence shows that plaintiff resigned at the conclusion of the hearing, failed to appeal, repudiated his contract, and his employment became terminable at will.

II.

In the alternative, defendant moves the Court to set aside said verdict and judgment entered thereon, and to grant defendant a new trial on the following grounds:

1. Defendant's motion for a directed verdict in its favor should have been granted because, (a) there was no substantial evidence to support the verdict; (b) there was no evidence that plaintiff was not given a fair hearing in accordance with the provisions of the contract, and (c) there was substantial evidence to support the decision of the hearing officer.

2. The verdict was against the weight of the credible evidence.

3. The verdict of the jury was excessive and showed prejudice and bias.

4. The Court erred in submitting to the jury the question of whether or not plaintiff had notice of the charge brought against him.

[fol. 88] 5. The Court erred in instructing the jury that the defendant could only discharge the plaintiff for just and sufficient cause.

6. The evidence shows that plaintiff resigned at the conclusion of the hearing, failed to appeal, repudiated his contract, and his employment became terminable at will.

7. The Court erred in refusing to permit Joseph L. Wilson to testify when recalled by the defendant after the rebuttal by plaintiff.

III

These motions are based upon the records and proceedings in this action.

Defendant submits with these motions a memorandum brief in support thereof and requests the privilege of making oral argument when said motions are set for hearing.

Rudy D. Garrett, Garrett & Ruark, and Harold L. Warner, Jr., Attorneys for Defendant.

Received copy hereof and copy of memorandum brief in support thereof this *16th* day of March, 1951, Fred J. Freel, Attorney for Plaintiff.

[fol. 89] [File endorsement omitted]

[fol. 90] IN THE UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND FOR NEW TRIAL—June 7, 1951

This cause came on to be heard on defendant's motion to set aside the verdict and judgment for plaintiff and to enter judgment for defendant in accordance with its previous motion for directed verdict, and in the alternative for a new trial, and it appearing to the Court that the motion for a directed verdict made at the close of all the evidence should have been granted because plaintiff failed to appeal from the decision of the hearing officer and exhaust all of his remedies to have the cause of his discharge reviewed as provided in the contract;

It is ordered

(1) That the verdict and judgment heretofore entered herein be set aside and that judgment now be entered herein dismissing plaintiff's complaint.

(2) That the motion for new trial be granted, unless the plaintiff agrees to a remittitur of $6,200.00, on the grounds that the Court erred in submitting to the jury elements of damages for mental suffering of mental anxiety, seniority rights, pass rights, and other fringe rights given to plain-

tiff by the bargaining agreement and his contract of employment, this ruling to take effect only in the event that the ruling of the Court on the motion for judgment is reversed on appeal.

Albert A. Ridge, Judge.

Dated at Kansas City, Missouri, this *7th* day of June, 1951.

[fol. 91] [File endorsement omitted]

[fol. 92] In United States District Court

Notice of Appeal—Filed July 7, 1951

Notice is hereby given that Joseph H. Koppal, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order and final judgment of the United States District Court for the Western District of Missouri, Western Division, entered in this action on June 7, 1951, setting aside the verdict and judgment theretofore entered in this cause for the plaintiff and entering judgment dismissing plaintiff's complaint and further directing a new trial unless the plaintiff agrees to a remittitur of $6,200.00 in the event that the judgment of the Court dismissing plaintiff's complaint is reversed on appeal.

Fred J. Freel, Ray D. Jones, Jr., Attorneys for Appellant, 900 Bryant Building, Kansas City, Missouri, HArrison 3632.

[fol. 93] In United States District Court

Appellant's Designation of Record—Filed January 15, 1952

Appellant, the above named plaintiff, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. The Complaint.
2. Answer to Complaint.

3. Plaintiff's Interrogatories to defendant filed in this cause and the defendant's Answers thereto.

4. Pre-trial Order of the District Court dated December 28, 1950.

5. Defendant's Motions for Directed Verdict submitted at the close of plaintiff's case and at the close of all the evidence.

6. Verdict and Judgment Entry dated March 10, 1951.

7. Motion of defendant to set aside Verdict and Judgment, etc.

8. Order of the District Court Setting Aside Verdict and Judgment dated June 7 1951.

9. Narrative of evidence and trial proceedings. (Attached hereto).

10. Plaintiff's requested Instruction on Punitive Damages.

11. Instruction of the District Court to the jury on Measure of Damages.

12. Notice of Appeal.

13. This Designation of Record.

As required by Rule 75(d) F.R.C.P., appellant makes the following statement of points upon which he intends to rely on his appeal in this cause:

[fol. 94] 1. The Court erred in sustaining defendant's Motion to Set Aside the Judgment and verdict for the plaintiff for the reason that defendant's Motion for Directed Verdict did not comply with Rule 50(a) F.R.C.P.

2. The Court erred in setting aside the judgment and verdict for the plaintiff for the reason that plaintiff failed to appeal from the decision of the hearing officer and exhaust all of his remedies to have the cause of his discharge reviewed as provided in the contract.

Fred J. Freel, Ray D. Jones, Jr., Attorneys for Appellant, 1013 Dierks Building, Kansas City, Missouri, Vi. 9240.

I hereby certify that I have mailed copy of the foregoing Appellant's Designation of Record to Ruby D. Garrett, 822 Scarritt Building, Kansas City, Missouri, this 15th day of January, 1952, Fred J. Freel.

[File endorsement omitted.]

[fol. 95] In United States District Court

Appellee's Designation of Record—Filed January 24, 1952

Appellee, the above-named defendant, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action in addition to the matters contained in appellant's designation of record filed on January 15, 1952:

1. The reporter's transcript of testimony as required to be filed by appellant pursuant to Order of the United States District Court for the Western District of Missouri, Western Division, dated January 22, 1952.

2. The following exhibits identified by the District Court at the pre-trial conference and introduced in evidence:

(a) The collective bargaining agreement between Transcontinental and Western Air, Inc., and the mechanics and related employees in the service of Transcontinental and Western Air, Inc., effective March 22, 1949.

(Exhibit A).

(b) Notice advising plaintiff of the hearing granted him by defendant pursuant to the collective bargaining agreement. (Exhibit 1).

(c) Plaintiff's written resignation (Exhibit 2).

(d) Employee's notification of absence. (Exhibit 3).

3. Defendant's trial brief.

4. Narrative of testimony of Mr. Carl G. Johnson, (Attached hereto).

[fol. 96] 5. Instruction of the District Court to the jury.

6. The deposition of the witness Edna Swink read in evidence at the trial.

7. Narrative of testimony of Mr. C. F. Woodling. (Attached).

8. Opinion of District Judge upon granting of defendant's motion to set the verdict aside.

Respectfully submitted, Garrett & Ruark, By Ruby D. Garrett, Attorneys for Defendant, 822 Scarritt Building, Kansas City 6, Missouri, Victor 0750, Harold L. Warner, Jr., Attorney for Defendant, 20 West 9th Street, Kansas City 6, Missouri, HArrison 4929.

I hereby certify that I have mailed copy of the foregoing Appellee's Designation of Record to Fred J. Freel, 1013 Dierks Building, Kansas City, Missouri, this 24th day of January, 1952, Harold L. Warner, Jr.

[File endorsement omitted.]

[fol. 97] IN UNITED STATES DISTRICT COURT

ORDER ON MOTION FOR DIRECTED VERDICT AND FOR A NEW TRIAL

At the conclusion of oral argument on defendant's Motion To Have The Verdict And Judgment Set Aside And To Have Judgment Entered In Accordance With Its Motion For A Directed Verdict And Motion For New Trial, the Court made the following ruling from the bench in sustaining said motion:

The Court: Of course the main point in this case is what is the impact of the Moore case on the Reed and the Harrison case. You have both been very enlightening in your remarks, although before your arguments I had an opportunity to go into this matter rather thoroughly.

I think that we have all been thinking along the same lines, and I have come to the conclusion, as the defendant does, that Moore vs. Illinois Central, 312 U. S. 630, does not overrule the Reed case or the Harrison case, and that the Reed case and the Harrison case express the law of the State of Missouri, governing the right of action and judgment to be entered in this case.

In chambers and throughout the trial of this case, you gentlemen both stated to the Court, and it is contained in the pre-trial order, that the contract of employment in this case is a Missouri contract. Whether you were talking about the bargaining agreement or whether you were talking about the individual contract of employment the plaintiff had with the defendant doesn't make any difference, they are both Missouri contracts. The record shows that the bargaining agreement was executed by the parties in the State of Missouri, the individual contract of employment was also stated as being entered into in the State of Missouri.

[fol. 98] Whether the bargaining agreement was made pursuant to the Railway Labor Act doesn't change the situation at all, because in this case the real contract of employment is the personal contract of hiring of the plaintiff by the defendant as augmented and supplemented by the provisions of the bargaining agreement. This is his individual contract of employment, contains all of the provisions and the benefits that accrue with reference to every employee of the defendant by reason of the arrangement of the bargaining agreement.

It being a Missouri contract, of course the Reed case applies; so does the Harrison case.

Now, the reason that I have come to the conclusion that the Moore case does not overrule the Reed and the Harrison case is this: In the opinion in the Moore case, all that the court discusses, the only matter that the court disposes of there by that opinion is that the provisions of the Railway Labor Act do not make it obligatory upon employees in the position of Moore to pursue an administrative remedy under the Railway Labor Act before bringing an action for wrongful discharge. The Moore case does not in any wise decide that an employee governed by an individual contract of employment, as supplemented by the provisions of a bargaining agreement, is not bound to exhaust all of the remedies available to him within the framework of the contract of employment that he has with his employer, before bringing action for breach thereof.

In the first Moore case, when it was before the Fifth Circuit, Judge Hutchison said that the bargaining agree-
[fol. 99] ment in that case was the contract of employment,

and that inasmuch as it covered employees of the railroad in several states, it was not a Mississippi contract, where Moore worked, neither was it an Illinois contract, where it was executed by the parties. Because of that situation he held it was a contract entered into in some sort of a nether state, which in his opinion brought it into some kind of federal jurisdiction so that it could be interpreted by federal common law principles. Judge Holmes didn't agree with Judge Hutchison in that opinion. As you remember, Judge Holmes wrote a dissent, stating that it was the individual contract of employment as supplemented by the bargaining agreement which made it a Mississippi contract.

Certiorari that was granted by the Supreme Court concerning that opinion doesn't touch that matter at all. The Moore case went back to the district court in Mississippi, it was tried, and it was dismissed by reason of a matter of res adjudicata. On the second appeal Judge Holmes, who wrote the dissenting opinion in the first case, wrote the opinion on the second appeal. In that opinion Judge Holmes holds that the contract of employment was a Mississippi contract that the court is there dealing with. The final decision, however, is disposed of by a consideration of a question of res adjudicata, which of course we are not concerned with here. But the Moore case finally winds up as establishing the proposition that the contract of employment there involved was a local contract, subject to the laws of the State of Mississippi and governed by Erie v. Tompkins.

[fol. 100] So, that being the situation concerning the opinion in the Moore case, I don't have any doubt but what the Reed case and the Harrison case are applicable here. The contract of employment that we have in the case at bar being a Missouri contract, it is to be interpreted according to the law of the State of Missouri. The Reed and Harrison cases require plaintiff, under the facts of this case, to exhaust the remedies provided in his contract of employment, to have his cause of discharge reviewed on appeal as therein provided, before bringing an action on the contract for wrongful discharge.

At the many conferences we had counsel for both sides made the statement to the Court that if this was a volun-

tary resignation, then the plaintiff had no right to recover; that if the resignation was involuntary, then it should be treated as a discharge. The law appears to be that a voluntary resignation before or subsequent to discharge, or even a resignation tendered only for the sake of appearance or at the employer's request, is a good defense in these actions. You can see the cases cited in 56 Corpus Juris, Section 51, at page 444, on that subject.

But in the light of the statements made to the Court by all counsel the question of whether or not plaintiff voluntarily or involuntarily resigned was submitted to the jury. When I submitted the question of whether plaintiff's resignation was voluntary or involuntary I had in mind the case of—I don't find it at the moment, it is a Northeastern decision, I can find it in my notes here, and then I will be glad to give it to you, I don't get my finger on it at the [fol. 101] present time. But in that case that I then had in mind it was held that where an employee was required to quit or resign under duress it was tantamount to a discharge of the employee and the employee could maintain an action for wrongful discharge. The case is Minor v. Narragansett Machinery Company, 42 Atlantic 711.

So the matter was submitted to the jury on the question of whether plaintiff was or was not required to resign. The jury must be held to have found that plaintiff did not voluntarily resign but was wrongfully discharged, that being the only finding that is compatible with their verdict. That being so, then comes the question that if the plaintiff was wrongfully discharged and he brings this cause of action upon his contract of employment as modified by the bargaining agreement, can plaintiff maintain this action on such contract, if he has not shown that he has exhausted remedies available to him to have the cause of his discharge reviewed administratively, as provided in the contract? The evidence establishes that he was given a hearing and told at the conclusion of the first hearing that he has the right to appeal from the decision of the hearing officer. He takes no appeal. Under the provisions of Section B-8 of the contract, that would make the decision of the hearing officer final. But assuming that he was not bound by Section B-8 of the contract, when does the breach of his contract of employment occur under such circumstances? Does

t occur at the conclusion of the first hearing, or does it oc-
ur after he has exhausted his remedy within the framework
f his agreement?

If he is suing on his agreement he must establish under
ll contract law that he has pursued and complied with all
he provisions that are mandatory on him before action can
fol. 102] be brought thereon. So it appears to me that
t would be necessary for plaintiff to establish that he has
omplied with all the mandatory provisions of the contract
efore bringing an action thereon because of a breach
hereof by defendant. If that be so, then the breach of con-
ract does not occur at the conclusion of the first hearing,
ut could only occur after he has exhausted all of his
emedies to have the cause of his discharge reviewed as
rovided in the contract. That is the holding of the Reed
ase, and that is the ruling also indicated in the Tennyson
ase. The question of exhaustion of administrative
emedies was not presented in the Tennyson case, but there
s an indicia ruling to that effect in that opinion when the
ourt says that methods were provided for full investiga-
ion of charges at a hearing of the employee's side thereof
efore action could be brought.

So we have the Reed case, the Harrison case, and the
'ennyson case as establishing the law of Missouri that if
laintiff has not exhausted remedies provided him by the
ontract in suit to have the cause of his discharge reviewed
efore bringing action for breach of his contract of em-
loyment, he cannot now maintain the instant action. In
iew of the fact that I have come to the conclusion that the
loore case does not overrule the Reed and the Harrison
ases, then under the situation so established by the evi-
ence the motion for a directed verdict at the conclusion
f all the evidence should have been sustained. Having
rroneously overruled that motion at the trial, then de-
endant's motion for a judgment notwithstanding the
erdict now before the court should be sustained and the
erdict be set aside and judgment be entered in favor of
ie defendant.

fol. 103] Undoubtedly there will be an appeal taken in
iis case, so I think that I ought to say that if I am held
o be wrong in sustaining the motion for judgment not with-
tanding the verdict, then the motion for new trial should

be sustained alternatively because of the submission by the court of elements of damages for mental suffering or mental anxiety, seniority rights, pass rights, and other fringe rights given to the plaintiff by the bargaining agreement and his contract of employment. There is a notation in 95 ALR 43, also a statement in 31 American Jurisprudence, 882, that actual loss in view of salary and wages is the only recovery that can be had in these cases, and that no recovery for loss of seniority or other fringe rights can be had. In 56 Corpus Juris, Section 58, pages 468 and 479, it is stated that the general rule is that no right of recovery for loss because of mental pain and suffering and for loss of damages which would accrue by continuing employment is recoverable in an action such as this brought under a bargaining agreement. The law of Missouri appears to be compatible to the general rule so stated. Counsel for plaintiff admits that he has no authority to the contrary authorizing recovery of damages for loss of fringe rights, as was submitted by the Court in this case. I understood him at the time of trial to say that he believed he could find such authority and on the strength of that statement submitted those items of damage to the jury. Therefore, even if the verdict in this case might legally be held as one authorized in plaintiff's favor, the amount thereof cannot be sustained because the Court specifically erred in submitting those matters for consideration by the jury.

The evidence clearly established, however, that the plain-
[fol. 104] tiff in this case suffered an exact amount of loss by reason of wages in the sum of approximately $1300, according to my notes, that is, that he could have earned during the period from the time of his discharge to date of trial approximately $3800, and that during that period he earned approximately $2500, with a resulting loss to him of $1300. So that, unless the plaintiff would agree to a remittitur in the case for the entire amount over $1300, the motion for new trial should also be sustained alternatively, if I am wrong in directing a judgment notwithstanding the verdict. So let that be the order in this case. Prepare an entry accordingly, gentlemen, setting aside the verdict of the jury and entering a judgment in favor of the defendant.

The statement with reference to the motion for new trial is made only for the purposes of the record, it need not be a part of the judgment entry at this time.

[fol. 105] IN UNITED STATES DISTRICT COURT

FILINGS—PROCEEDINGS

June 30, 1950. Complaint filed.

Aug. 14, 1950. Answer filed.

Aug. 29, 1950. Interrogatories to defendant and motion to produce filed.

Sept. 12, 1950. Answers to interrogatories to defendant and motion to produce filed.

Oct. 2, 1950. Order sustaining plaintiff's motion to produce documents for inspection filed.

Dec. 29, 1950. Pre-trial Order filed.

Feb. 12, 1951. Plaintiff's interrogatories to defendant filed.

Feb. 28, 1951. Answers to plaintiff's interrogatories to defendant filed.

Mar. 7, 1951. Case called; jury empanelled; trial.

Mar. 8, 1951. Trial resumed. Defendant files motion for directed verdict.

Mar. 9, 1951. Trial resumed. Motion for directed verdict filed by defendant. Requested instructions filed.

Mar. 10, 1951. Trial resumed. Verdict—Judgment for plaintiff in sum of $7500.00 and costs.

Mar. 19, 1951. Defendant's motion to have verdict and judgment set aside and to have judgment entered in accordance with its motion for a directed verdict, and motion for new trial filed.

May 25, 1951. Motion to set aside verdict and judgment, etc. heard and submitted and sustained (Judgment to be entered in favor of defendant) Order to be prepared.

June 7, 1951. Order setting aside verdict and judgment and entering order dismissing complaint, etc. filed.

July 7, 1951. Notice of Appeal filed by plaintiff. Copy mailed to Ruby D. Garrett, Attorney for defendant.

Aug. 16, 1951. Order extending time for filing record on appeal filed (Oct. 5, 1951).

Oct. 3, 1951. Motion for leave of court to proceed with appeal in forma pauperis filed.

Oct. 4, 1951. Order extending the time for filing of affidavit, designation of record, stipulation of facts and suggestions in support of plaintiff's motion to proceed with appeal in forma pauperis, filed.

Oct. 19, 1951. Order extending time for filing of affidavit, designation of record, stipulation of facts, and suggestions in support of plaintiff's motion to proceed with appeal in forma pauperis, to November 2, 1951, filed.

Nov. 2, 1951. Suggestions in support of plaintiff's motion to proceed with appeal in forma pauperis filed.

Affidavit filed.

Nov. 6, 1951. Defendant's brief in opposition to plaintiff's motion for leave of court to proceed with appeal in forma pauperis, filed.

Nov. 16, 1951. Order denying plaintiff's motion for leave to proceed with appeal in forma pauperis, filed.

Dec. 6, 1951. Certified copy of Order from U. S. Court of Appeals authorizing reconsideration of motion to appeal in forma pauperis, filed.

Dec. 7, 1951. Motion to reconsider order denying appellant's motion for leave of court to proceed with appeal in forma pauperis, filed, without suggestions in support by leave of court.

Dec. 28, 1951. Order for granting time to file designation of record and affidavits in support of motion to appeal in forma pauperis filed.

[fols. 106-108] Jan. 7, 1952. Order extending time to Jan. 14, 1952 for plaintiff to file designation of record and affidavits in support of motion to proceed in forma pauperis filed.

Jan. 11, 1952. Motion to compel plaintiff to furnish reporter's transcript of testimony and proceedings at the trial as part of the record of appeal, with citations in support, filed.

Jan. 15, 1952. Order extending time to plaintiff to file designation of record and affidavits in support of motion to proceed in forma pauperis filed.

Appellant's Designation of Record filed. Affidavit of Joseph H. Koppal filed.

Jan. 21, 1952. Order denying plaintiff's motion for leave of court to proceed with appeal in forma pauperis filed.

Jan. 22, 1952. Order sustaining defendant's motion to compel plaintiff to furnish the reporter's transcript of testimony and proceedings at the trial, etc. filed.

Jan. 24, 1952. Appellee's Designation of Record filed.

Feb. 4, 1952. Partial transcript of proceedings filed.

[fol. 109] **Appellees Supplement to Record**

NARRATIVE OF EVIDENCE

Following is appellee's narrative of the evidence as taken from the transcript of the trial prepared by the official Court Reporter, the original of which is on file with the Clerk of the United States District Court for the Western District of Missouri.

BETTY KOPPAL

Appellant's narrative (R. 45-48) fairly presents the testimony of this witness called on behalf of plaintiff, except that Mrs. Koppal did not testify that she had called Mr. Wilson to come over in the morning as indicated by appellant's narrative (R. 47).

As indicated by the transcript, Mrs. Koppal never answered that question.

"Q. Did you call Mr. Wilson that morning and ask him to come over to your house?

Mr. Garrett: Just a minute, I object to that as leading and suggestive.

The Court: Don't lead your witness." (Tr. 13, 14).

The question was never rephrased or answered. On the contrary, plaintiff testified on the first day of the trial that we got in touch with him, I don't remember who called (Tr. 76). On the second day of trial after further reflection, plaintiff testified:

[fol. 110] "Q. Yesterday, I understood you to say that you didn't know whether Mr. X, whom you have now iden-

tified as Mr. Joe Wilson, was called by you or your wife? Was that correct?

A. Yes. I don't know that either of us called him." (Tr. 103).

JOSEPH KOPPAL

Joseph Koppal, the plaintiff, being duly sworn testified that his employment with defendant extended from November 16, 1942 until November 9, 1949 (Tr. 23). He intended to make his life's career with defendant where he was employed as a master mechanic in the engine build-up shop (Tr. 24).

He had been absent from work five times during 1949. During October and November 1949 he was preparing to take a Flight Engineers' examination which was scheduled to be held on November 10, 1949 (Tr. 26, 27).

At the close of work on November 7, 1949 he felt rather bad. He told a couple of co-workers about it and asked one fellow in particular to come over the next day to pick up his application if he didn't come in. He retired rather early that night after taking some digitalis and felt worse in the morning (Tr. 27, 28).

He stayed in bed in the morning. His wife put some stuff on his jaw and he put a heating pad on his face and went to sleep. He got up around 10:30 a.m. when another fellow worker, a Mr. DeMattia, whom he was not expecting, yelled through the door (Tr. 29). He was expecting Mr. Joe Wilson to call because he had talked to him the night before [fol. 111] and he thought his wife had called Mr. Wilson. He dressed in T-shirt, slacks and slippers when Mr. DeMattia came and he was dressed that way when a Mr. Hicklin of defendant's personnel department called (Tr. 30).

He told Hicklin he couldn't come to work because his jaw hurt, tooth or infection (Tr. 31).

"Q. What did you and DeMattia and Wilson do from the time they arrived between 10:30 and 11 until they left?

A. Oh, we talked, well, mostly about the examination, I suppose, the thing we all had in common." (Tr. 32).

After retiring early that night he went to work in the

morning, feeling a little better. About 10 o'clock he had the defendant's nurse paint his throat and give him some lozenges (Tr. 33). The nurse did not take his temperature (Tr. 34).

Mr. Myers, manager of defendant's engine department, whom he didn't know at all called him into the office in the afternoon. Mr. DeMattia, Mr. Grey, the shop steward, and a Mr. Woodling of personnel were there with Mr. Myers (Tr. 35).

"Q. All right. Go ahead then. He asked you why you hadn't reported to work the day before?

A. Yes, and I told him that I was ill.

Mr. Garrett: A little louder, please.

A. And then I think the conversation went on about, oh, was DeMattia at my house and I said, "Yes," and he said, "What time?" I think I told him about 10:30 or 11, somewhere along in there, and he said, "Well, that is strange, he told me he was there at 12." And I said, "Well, if he told you he was there at 12, I don't know anything about what [fol. 112] he said, but I told you what time to my best knowledge he was there." And so then he continued to ask questions that would involve me saying something about DeMattia and I didn't think it was my place to say anything about DeMattia. I was there to defend myself, if necessary, but I didn't see why I should involve DeMattia. So——

Q. Was DeMattia a very good friend of yours?

A. We had been very good friends, yes.

Q. How long had you known him?

A. About six or seven years, I guess, from the time we both started to work for the company." (Tr. 36, 37).

"Q. No. Did Mr. Myers ask you anything about a sick-pay claim?

A. Yes, he asked me had I put in for one and I told him no. He said "Do you intend to?" I said yes. I mean if I had said "No, I don't intend to," he would have said, "Well, you aren't sick, then."

Mr. Garrett: Just a minute, I object to that as being an argument on the part of the witness and ask it be stricken out.

The Court: Sustained. Just state the conversation that you had with him, Mr. Koppal.

Q. (By Mr. Freel) What did Mr. Myers say to you in addition to what you have related to the Court and the jury here, at that conference on the 9th?

A. Well, it is a little difficult to remember all the details, but there was—I mean all the questions were leading that I should involve——

[fol. 113] Mr. Garrett: Just a minute, I object to the statement, "all the questions were leading."

The Court: Overruled.

A. All the questions were leading that I should involve DeMattia in this thing, and so far as I was concerned I had no reason to, and——

Q. What do you mean when you say "involve DeMattia"?

A. Well, there was a discrepancy in the times that DeMattia said he arrived at my house and the time that I said he had arrived, and I mean I told the truth so far as I knew as to the time he arrived, but DeMattia seemed to have had a different idea about the time he arrived and that then seemed to be the whole basis that Mr. Myers was going to hang me on.

Q. What was the conclusion of that conference in Mr. Myers' office?

A. Well, he said, "I think you are both a pair of big liars," and he said, "I am going to suspend you, pending a hearing," and he said, "We will decide when the hearing will be and you can step out in the hall and wait until we decide." So we waited until they called us and told us that tomorrow would be a good day for the hearing, and we said that we were supposed to take our examination tomorrow and they said, "Well, we will make it the next day, then." So the result was when we went to take the examination they wouldn't let us take it." (Tr. 37-39).

"Q. (By Mr. Freel) Did you and Mr. Myers have any discussion at that conference on November 9th about whether or not you were actually sick on November 8th?

[fol. 114] A. Well, Mr. Myers said he didn't think I was sick enough to take off from work and I asked him who was to be the judge of who was sick enough, did he know any-

thing about my feelings? I told him that I was the only one who could say whether or not I was sick enough not to work and he said, "I agree that you may have felt bad." He said, "We all feel bad once in a while, but," he said, "that isn't any reason why you couldn't work."

Q. As a result of that discussion did you and Mr. Myers go any place?

A. Yes, after which we went over to the nurse and she took my temperature and examined my throat and told Mr. Myers that it was inflamed and that I had a slight temperature even at that time, which was a day later." (Tr. 39-40).

The written notice of suspension advising of the hearing under the collective bargaining agreement reached plaintiff's home on Saturday, after the hearing on Friday (Tr. 42).

The hearing started at 9:30 on Friday with Mr. Huff presiding and Mr. Myers, Mr. Woodling, Mr. Parker, Mr. Bowman and two other members of the grievance committee in attendance (Tr. 43).

"Q. How did the hearing start?

A. Well, it started by Mr. Myers telling Mr. Huff exactly what his opinion was on the thing and that was quite likely an——

Q. Did Mr. Huff make a statement of any kind at the beginning of the hearing? Let me interrupt you.

[fol. 115] A. I think nothing more than just a formal statement of what was supposed to transpire. I mean that we were to listen to the evidence against us and so forth.

Q. Go ahead.

A. Well, I can't remember exactly what did transpire at that point." (Tr. 44).

"Q. Who was the first man to testify at the hearing?

A. Well, as nearly as I can remember, Mr. Myers started off with quite a long conversation on how we had abused our sick leave privilege and how it was quite obvious that we were in some sort of a mix-up together and that if we wanted to come clean perhaps they could be a little more lenient on us, and all that sort of thing, and we couldn't come clean. I mean, I had nothing to come clean about, I had told the truth. I mean, whatever DeMattia had said was strictly his testimony, not mine.

Q. Did Mr. Huff ask you any questions during the hearing?

A. Yes, he did.

Q. Do you recall what he asked you?

A. He asked me was I ill, I told him yes. He asked me the same questions Mr. Myers had put to me practically.

Q. What questions were those?

A. What time DeMattia arrived. I mean at that point I was probably fairly—had it fairly fresh in mind and I think I gave him very straight answers on it, and there wasn't any—well, any doubt in my mind at that point that they were exactly the facts the way they were.

[fol. 116] Q. Did anyone lose their tempers at the hearing?

A. Well, I suppose I did when I was called a liar. I suppose most anyone would.

Q. Who called you a liar?

A. Mr. Myers.

Q. Did anyone else call you a liar?

A. Well, it was intimated, but not necessarily told so plainly as Mr. Myers put it.

Q. Now, how long did this hearing last?

A. I think until about close to 3 or somewhere along in there because it was almost finishing time when it was finally over.

Q. Did you take time off for lunch?

A. No, this was after lunch.

Q. I say, did they adjourn the hearing for lunch?

A. Yes, we did go out to lunch, yes.

Q. Did anyone testify after lunch?

A. I don't remember how the testimony was timed. I mean it was more or less of a big formal chit chat with the union discussing their problems with Mr. Huff and Mr. Myers and it seemed that that was more involved than our situation at several times, about whether or not they had the right policy and so forth, and that is what led into the long discussion more than our troubles.

Q. Was anyone representing you at that hearing?

A. No.

Q. Was anyone supposed to represent you?

[fol. 117] A. Well, I think ordinarily the union would be, but I didn't happen to be a member at the time.

Q. What happened at the conclusion of the hearing?

A. Well, Mr. Huff said, "You will sign this paper saying you resign or I will discharge you as of now." And I said, "Don't I get a chance to get some counsel on it or can't I do it in a day or so," or I mean, "can't I have some time to think about it at least?" and he said; "No." He said, "You have had a very good record so we are going to allow you to resign rather than discharge you." So I said, "Well, may I sign it as under protest?" and he said, "You will put nothing but your name on the paper and that is it, or you will be discharged as of now."

Q. Was there any conversation about the flight engineer's examination at that time?

A. Well, I think DeMattia mentioned would this interfere with our taking the examination and I think Mr. Myers said so far as he could see that he saw no reason why it would since it was in a different department and you would be hired in a different department.

Q. Did you finally sign that resignation?

A. Yes.

Q. Did you sign it under protest?

A. I wasn't allowed to put under protest on it.

Q. Did you tell Mr. Huff that you were signing it under protest?

A. Very definitely.

[fol. 118] Q. Would you have signed that resignation if Mr. Myers had not told you that you could take the flight engineer's examination?

A. It wouldn't have made much difference if I couldn't take the examination whether I was discharged or whether I resigned, but that was the important thing in mind at the time, that if I meekly went out I could still get a chance at the flight engineer's examination.

Q. That was the thing foremost in your mind at the time?

A. Yes." (Tr. 45-4).

Plaintiff stated he was unemployed until January 20, 1950 when he went to work for A. C. Cooke Company until February 13, 1950, (Tr. 51) earning $127.50 (Tr. 52).

His next job was with Davidson's Furniture Company where he worked from March 2, 1950 until April 12, 1950 earning $300. Following that he worked with Caldwell &

Associates from April 24, to November 3, 1950 earning $2,025.80 (Tr. 52).

He went to work for Engineering Maintenance Co. in California on November 16, 1950 earning $280.60 until he went to work for Lockheed Aircraft Company at $1.82 an hour on December 16, 1950 (Tr. 53, 54).

"Q. And did you work an average of 40 hours a week there (with defendant)?

A. Well, we usually worked better than 40 hours, one or two nights a week we would work over.

Q. What was your average work week as far as hours are concerned?

[fol. 119] A. Oh, usually from 40 to 46, 48 hours.

Q. The average would be around 44?

A. I would say so, yes." (Tr. 55).

On cross examination, plaintiff stated he did not know Mr. Myers or Mr. Huff prior to the hearing and had never had trouble of any kind with anybody with defendant prior to the grievance hearing (Tr. 56).

He knew he was covered by the union agreement (Tr. 57), but the first time he saw the contract was when Mr. Woodling gave it to him at the end of the hearing (Tr. 58).

"Q. But did you say in your direct examination that Mr. Myers at first set the hearing down for November 10th?

A. I think that was the original idea, yes.

Q. And then you suggested that it be set at some other date, didn't you?

A. I don't know whether it was me or whether it was DeMattia, but it was agreed upon another day anyhow.

Q. It was agreed that it would be set down at another date, and was that setting date agreeable to you?

A. Yes.

Q. Now, you knew the charges that were to be heard before Mr. Huff, did you not?

A. I had an idea what they were.

Q. How is that?

A. I had an idea of them, yes.

Q. You were satisfied in your own mind that you were to be tried on the charges of abusing the sick leave privileges, weren't you?

[fol. 120] A. I thought that we were going in there for a little scare session, that is all.

Mr. Garrett: Read the question.

(The preceding question was read by the reporter.)

A. Well, what was in my mind at that time was that we were going for a scare session, yes, sir.

Q. You didn't know that you were going in there to be tried for abusing the sick leave privileges on the 8th of November, 1949?

A. That was the gist of it, yes.

Q. So you did understand that that was the issue to be heard before Mr. Huff?

A. That was the issue, yes.

Q. And you were given to understand that, were you not, Mr. Koppal? Immediately after your suspension in the office of Mr. Myers?

A. No, not immediately. We waited outside for a while.

Q. Yes, sir, but when you came back in?

A. Yes.

Q. So that before you left the vicinity of Mr. Myers' office you knew that you were to be tried on a charge of abuse of the sick leave privilege?

A. Yes." (Tr. 63-65).

"Q. You don't recall it definitely. To refresh your recollection, didn't Mr. Myers say that Mr. DeMattia had said that he was sick all the morning and he had gotten up and was trying to find a Dr. Leitch? Do you remember that [fol. 121] part of it?

A. I remember something of that sort, yes, later on.

Q. And do you remember that Mr. DeMattia had stated that he didn't know where Dr. Leitch lived or where his office was and the fact that he didn't know where he lived or where his office was hadn't occurred to him until he was on the viaduct?

Mr. Freel: If the Court please, I think this is immaterial as to what Mr. DeMattia had to say about it.

The Court: Overruled. It is in the presence of the parties. Go ahead.

Mr. Freel: If the Court please, the question was directed——.

The Court: It is not binding upon the defendant here as to the correctness of what Mr. DeMattia said, but it is a part of the hearing.

Mr. Garrett: That is the only purpose of it, your Honor.

Mr. Freel: If the Court please, my objection was to this particular question. I understand the Colonel to ask the witness what DeMattia had said.

Mr. Garrett: No, I said what Mr. Myers had related that Mr. DeMattia had said.

Q. (By Mr. Garrett) Do you remember now that he did say something about being on the way to a doctor?

A. Something like that came out in the conference, yes.

[fol. 122] Q. And that he had forgotten that he didn't know where the doctor that he was going to see lived or had his office? Do you remember that?

A. As I say, I may remember something relative to that.

Q. And that then he decided to go over and get a slide rule from you, do you remember that?

A. Yes." (Tr. 66, 67).

The plaintiff and Mr. DeMattia agreed to a joint hearing (Tr. 68). He didn't remember whether or not Mr. Huff commenced the hearing by reading the letter of suspension (Tr. 68).

"Q. Did you say whatever you wanted to say at the hearing?

A. No, I controlled myself.

Q. What is that? You say you controlled yourself?

A. Yes, sir.

Q. You were sore there at that time?

A. I suppose I was, yes.

Q. You were angry there at that hearing before Mr. Huff, is that correct?

A. I possibly was.

Q. Well, do you remember that you were or were not, Mr. Koppal?

A. I was. Of course, I was." (Tr. 69).

After the hearing Mr. Woodling gave him a copy of the contract, drawing a circle around the appeal provisions and

telling him how to appeal (Tr. 71). The plaintiff did not appeal (Tr. 72).

[fol. 123] Plaintiff stated he had been working every night on the examination with Mr. DeMattia (Tr. 74).

"Q. To refresh your memory, didn't you testify when your deposition was taken that you, yourself, called Mr. Wilson?

A. I think the way I testified was that I was in touch with Mr. Wilson on it and I didn't mention Mr. Wilson at that time at all, because I preferred not to involve him in it at all.

Q. You referred to him as Mr. X?

A. That is right. He might get the same thing I got.

Q. Now, I will ask you if when your deposition was taken, December 12, 1950, this question was asked and you didn't make this answer:

"Did anybody else come over to get any books?"

"A. No, I called another fellow and asked him to come over and pick up my application and take it and——".

Was that question asked and that answer given by you?

A. Yes.

Q. Do you remember now that you did telephone to Mr. Wilson?

A. I don't remember how I—no, I talked to Mr. Wilson before I left work that night. My main idea was not to get Mr. Wilson involved at all.

Q. Just answer the question and then if Mr. Freel is not satisfied he will inquire further. Did you call him by tele-

[fol. 124] phone?

A. I contacted him before I left work and I don't remember whether I called him or whether my wife called him, but I think we called him, yes." (Tr. 76, 77).

"Q. Who met Mr. Wilson at the door? Did you let him in?

A. I don't remember that I did.

Q. You don't remember that. Your do remember that you met Mr. Hicklin, you remember that, do you?

A. Yes.

Q. And you do remember that you let Mr. DeMattia in?

A. Yes.

Q. But you don't know whether you let Mr. Wilson in?

A: I think when the doorbell rang I just went to the top of the stairs and saw who it was and said, "Come on up." I think that is the way it happened.

Q. Do you remember that you did that?

A. No, I don't remember that I did." (Tr. 78, 79)

"Q. Now, weren't you and Mr. DeMattia working there at the dining-room table with books and papers spread out all over it when Mr. Wilson arrived?

A. That is a possibility." (Tr. 79).

"Q. Now, you remembered at the time you were going up for hearing before Mr. Huff on the charge that you had [fol. 125] abused the sick leave privilege, you knew at that time that Mr. Wilson had been there in that home with you?

A. Yes.

Q. And you did not call him to testify?

A. Why should I involve a man that is not involved?

Q. I didn't ask you that. You did not call him to testify, did you?

A. Naturally I didn't.

Q. You did not mention in the hearing before Mr. Myers that Mr. Wilson, the man you in your deposition designated as Mr. X, was out there in your house that morning, did you?

A. He didn't ask me.

Q. You didn't mention it, though, did you?

A. Why should I?

The Court: The question is whether you did or not.

A. No, I didn't, no.

Q. No. Didn't he ask you who was present out there in your house, and you said DeMattia was there?

A. Yes.

Q. And at that very time Mr. Wilson was in your house, wasn't he?

A. He didn't ask me was Mr. Wilson there.

Q. But when he asked you who was there, you simply said Mr. DeMattia was there?

A. Yes, naturally.

[fol. 126] Q. Naturally, because you didn't want it known that Mr. Wilson was there.

A. I didn't want to involve Mr. Wilson, of course not. You see what we got, don't you?". (Tr. 80, 81).

The plaintiff stated he had no doubt at all from the time he was suspended until the hearing as to what the charge against him was (Tr. 85).

After Mr. Hicklin's call, he rejoined his friends Mr. DeMattia and Mr. Wilson upstairs in his house but he didn't recall discussing Mr. Hicklin's call with them at all (Tr. 87). Mr. Wilson left around 1:30, possibly later and Mr. DeMattia left around 1:00 (Tr. 87, 88).

At the hearing plaintiff said "I see no reason why the union is here at all. I don't belong to them" (Tr. 90).

"Q. Turning to Page No. 3 of your deposition, I will ask you if this question was not asked, these questions were not asked and these answers given by you, Mr. Koppal, under oath at the time your deposition was taken in Los Angeles, California, Thursday, December 14, 1950:

"Q. Do you recall the events of the day of November 8, 1949?

"A. I think that is the day in question that the so-called abuse of sick leave took place.

"Q. Right.

"A. Yes. I wasn't well. I had a temperature and a swollen jaw and it had lodged in my throat and my wife called and asked that I be excused from work that day, and [fol. 127] so that was all there was to it until approximately one o'clock, I suppose the—I don't know what his capacity was, he was from Personnel, came to find out if I really was sick, and I had gotten out of bed at the time."

Was that question asked, and that answer given by you?

A. Yes.

Q. At the time you gave that, you thought that he had arrived at about one o'clock, did you?

A. No.

Q. Well, why did you swear that he had arrived at one o'clock there?

A. It is very easy to become confused when people are firing questions at you." (Tr. 98, 99).

"Q. Page 13, at the top of the page; I will ask you when your deposition was taken in California, if Mr. Warner didn't ask you this question and if you didn't make this answer:

"Q. Was there anybody in your house at the time Mr. Hicklin called, besides yourself? You say your wife was not there?

"A. No. Yes, a fellow named DeMattia was there. He had come over to borrow a book and he left, I guess, about an hour after."

Q. Was that question asked and was that answer given?

A. Yes.

[fol. 128] Q. As a matter of fact, he was there from 10:30 until about 1:30, according to your testimony yesterday, wasn't he?

A. Yes." (Tr. 102).

"Q. Yesterday, I understood you to say that you didn't know whether Mr. X, whom you have now identified as Mr. Joe Wilson, was called by you or your wife? Was that correct?

A. Yes. I don't know that either of us called him." (Tr. 103).

"Q. Turning to Page 16, I will ask you if these questions were not asked and this answer given by you when your deposition was taken in California:

"Q. Do you recall what time it was that she served lunch?

"A. I imagine around—oh, it must have been around one, somewhere around there.

"Q. And what time did Mr. Hicklin call?

"A. Just previous to that time, I think, around 12:00 or 12:30, somewhere between 12:00 and 1:00. She had just left.

"Q. And Mr. DeMattia and Mr. X were in the house before Mr. Hicklin called around 12:00?

"A. No, I don't think Mr. X was. I think just Mr. DeMattia was, because I called him and asked him to come over." Were those questions and those answers given by you?

A. If it is there, I imagine it was.

[fol. 129] Q. Do you say it was or was not?

The Court: He says if it is in the deposition he gave the testimony.

Q. (By Mr. Garrett) Yes. I will ask you, turning to

Page 17, if the following questions and the following answers were not given by you:

"Q. How long was Mr. X there? Mr. Hicklin called around 12:00. Your wife served lunch at 1:00.

"A. I frankly don't remember.

"Q. You don't recall whether a man stays at your house an hour—two hours?

"A. Well, possibly he stayed about half an hour or 45 minutes.

"Q. And that half an hour would have begun when your wife served lunch at 1:00?

"A. No, that would have been during that time.

"Q. So that you now think he arrived around 12:30?

"A. I think so."

Were those questions asked and those answers given by you?

A. If they are in the testimony.

Q. What is that?

A. Yes, sir.

[fol. 130] Q. You knew that Mr. Wilson, whom you designated Mr. X, was on the twilight shift, didn't you?

A. Yes.

Q. He didn't go to work until 3:30, did he, in the afternoon?

A. That is right.

Q. You knew that he was not laying off of work in order to be at ~~your~~ place. You knew that he had stayed at your house, according to the testimony yesterday, for around three hours?

A. No, he wasn't there nearly that long.

Q. As I understood it, you testified yesterday that he came around 10:30 and left around 1:00 to 1:30. Do you want to change that?

A. I would say about two and a half hours, somewhere along there.

Q. Two and a half hours?

A. Maybe not that long. He must have come there about 11:00 and stayed until about 1:00 or 1:30, somewhere along in there." (Tr. 104, 106).

"Q. (By Mr. Garrett) No. Now, you stated that you refused to give—you referred to Mr. Wilson ~~as~~ Mr. X be-

cause you didn't want to involve him in your trouble; didn't you say that in your deposition yesterday—I mean your testimony yesterday?

A. That is true.

[fol. 131] Q. Well, you knew that he was not involved, didn't you?

A. Will you please repeat that?

Q. You know that Mr. Wilson was not involved?

The Court: How do you mean involved, Colonel?

Q. (By Mr. Garrett) You know that he was not violating any rules didn't you?

A. No, he wasn't violating any rules, but they would have fixed it where he was." (Tr. 108, 109).

On redirect examination the plaintiff reiterated that he didn't recall whether or not he telephoned Mr. Wilson to come over to his house on November 8, 1949 (Tr. 111).

The plaintiff testified he was unemployed for about 10 weeks, couldn't keep up with his bills and lost his car. His wife went to work and he was worried about his household bills (Tr. 118, 119). The Company was apparently trying to cut down absenteeism (Tr. 120).

"The Court: Now, at the hearing that you had on November 11th, Mr. Koppal, did anybody stop you from telling your side of the story there? That is, did you have an opportunity to talk and tell about your illness?

A. Yes, I did, sir.

The Court: And you did tell them all about everything that transpired there?

A. With the exception of the fact that Mr. Wilson was there. I don't think that was asked of me and I don't think I brought it in.

[fol. 132] The Court: You just didn't mention that?

A. That is right.

The Court: But what I am getting at is that you had an opportunity at the hearing to relate what transpired at the plant and also what transpired at your home on November 8 concerning your condition?

A. I thought Mr. Myers knew the situation as well as I did and I actually thought is was just mostly for Mr. DeMattia's benefit as much as it was for mine, and when we

went to take the examination the next morning I wouldn't have had time to get any witnesses or anything, anyhow.

The Court: You did have an opportunity to tell your side of the story there at that hearing?

A. Yes.

The Court: And was there evidence there at that hearing by some of the other men, this Mr. Hicklin and Mr. Myers, to the effect that you were not ill on that day?

A. No.

The Court: Did Mr. Hicklin testify at that hearing?

A. I think he was in for a very short time.

The Court: Did he give testimony as to his visit to your home?

A. I think the only thing he mentioned was that he called and that I answered the door and the conversation we had, and then he left the room.

[fol. 133] The Court: And Mr. DeMattia, did he testify at the hearing, also?

A. Yes, sir.

The Court: He related about his visit to your home on that day?

A. Yes.

The Court: And what you were doing there at your home, as you have testified here?

A. Yes." (Tr. 123, 124).

At the conclusion of the trial recalled for redirect examination the plaintiff testified as follows:

"Q. Mr. Koppal, were you present here in the courtroom when Mr. Myers testified that as you left his office after the conference on November 9, that you made a remark which I believe he said was as follows: "A man is entitled to one mistake."?

A. Yes.

Q. Will you tell the jury how you happened to make that remark?

A. Well, the only mistake that I had known to that time that anybody had made was DeMattia's accounting of the time that he arrived at my house and my accounting of it, and I was saying that in defense of DeMattia. I thought that certainly he should have the right to one mistake, I mean after being with the company seven years, and if he

did make one mistake I should think he would be entitled to it, and that was the relation in which I made the remark. [fol. 134] Q. Had you been talking about Mr. DeMattia with Mr. Myers prior to the time that you made that remark?

A. Yes." (Tr. 292).

LESLIE MYERS

Leslie Myers, a witness for defendant, being duly sworn testified he was Manager of Overhaul for defendant (Tr. 125).

On November 9, 1949 he received a report from Mr. Hicklin that he had found Mr. DeMattia's car at plaintiff's home (Tr. 126). He called plaintiff and DeMattia into his office. Mr. Grey, the union steward, was there to see that the rights of the employees under the collective bargaining agreement were protected. Also present were the foremen, Mr. Lichtenberger and Mr. Parker and Mr. Woodling of Personnel (Tr. 127).

"Q. Will you tell the Court and jury, please, just what conversation of Mr. DeMattia you repeated to Mr. Koppal.

A. I told Mr. Koppal that Mr. DeMattia had stated that he got up around noon, had lunch, and wasn't feeling very good and decided to go see a Dr. Leitch. During the time he was going to Dr. Leitch's office he realized as he was on the Intercity Viaduct that he didn't know Dr. Leitch's address. I asked him why he did not contact the First Aid room, which was very close to the Intercity Viaduct, for medical attention and also in an effort to find Dr. Leitch's address. He said that did not occur to him. He said that he also realized while he was on the Intercity Viaduct that [fol. 135] he could use a slide rule to practice up for his examination for the flight engineer's and that he had gone to Mr. Koppal's home to obtain the slide rule.

Q. Now, before you repeated that conversation as to the time to Mr. Koppal, had you asked Mr. Koppal any questions?

A. I had, sir.

Q. What were those questions?

A. When Mr. Koppal first came in the room I asked him if he intended to file for sick pay continuous, and he said that he did, however, he hadn't gotten around to it.

Q. Had Mr. DeMattia filed for sick leave?

A. He had, sir.

Q. Go ahead.

A. Then I asked him what time Mr. DeMattia arrived at his home, and he said he thought around 11 o'clock.

Q. What time had DeMattia said he had arrived at Mr. Koppal's home?

A. He said he had arrived there, as I recall, approximately 12 to 12:30.

Q. And what did Mr. Koppal or Mr. DeMattia do when that discrepancy in time was revealed?

A. Well, Mr. DeMattia looked at Mr. Koppal in a very nervous fashion and Mr. Koppal at that time realized that he had given the wrong answer——

Q. Don't tell what he realized. That the Court and jury has to decide.

[fol. 136] A. Well, Mr. Koppal became very nervous and jumped up and says, "What is this, a cross-examination?"

Q. Was his attitude one of—was his appearance one of anger or otherwise?

A. He was rather angry, and I explained to him that I was merely trying to get to the facts of the case so we could get it cleared up as soon as possible." (Tr. 128, 129).

Plaintiff stated that he had taken off because he was sick, but he had reviewed some of the work for the flight engineer's examination. Mr. Hicklin was called in and he told of his call at plaintiff's home where plaintiff answered the door bell, dressed and with a pencil in his hand (Tr. 130, 131).

Because Mr. Myers felt he was not getting all the facts he told the men it did not look good for them and suggested they tell him all they could about the situation. They stated they had nothing further to say so he explained to them that his only alternative was to suspend them pending a hearing. The plaintiff got up and started to walk out of the office saying "Well, a man is entitled to one mistake, isn't he?" (Tr. 132).

Mr. Woodling got a copy of the contract and explained to the men what the hearing was about and it was agreed that the hearing would be on November 11 (Tr. 132).

Mr. Myers then checked with the nurse's office to see if the plaintiff had signed in for treatment that day. There was no record of any such treatment. While he was there the plaintiff came in and the nurse examined him. She said plaintiff's throat was slightly inflamed and he had a slight elevation in temperature, about half a degree (Tr. 134). [fol. 137] Mr. Koppal was rather angry at the time (Tr. 135).

The hearing on November 11 commenced with Mr. Huff's reading the letter of suspension (Tr. 135), (Exhibit 1, R. 42). The men agreed to a joint hearing (Tr. 137).

At the hearing Mr. Myers related the events in his office at the time of suspension (Tr. 137). Mr. Hicklin recounted his call without denial or questioning on the part of plaintiff. The hearing continued from 9:30 a.m. to 3 p.m. with adjournment for lunch (Tr. 138).

Mr. Myers asked plaintiff who was at his house that day and plaintiff replied Mr. DeMattia, not mentioning Mr. Wilson's presence (Tr. 143).

The first knowledge Mr. Myers had that plaintiff was not a union member was toward the end of the hearing (Tr. 144).

On cross examination Mr. Myers testified that there was no particular drive on absenteeism (Tr. 145). The plaintiff was quite vague about all the times, particularly after he realized that his statement did not jibe with Mr. DeMattia's (Tr. 150). The plaintiff stated Mr. DeMattia didn't arrive until 11 o'clock whereas Mr. Hicklin had seen Mr. DeMattia's car in front of plaintiff's home at 10:30 (Tr. 151).

Mr. Myers stated positively that he made no promise to plaintiff that plaintiff could take the flight engineer's examination if he signed the resignation (Tr. 173, 175).

[fol. 138] CHARLES E. BOWMAN

Charles E. Bowman, a witness for defendant, being duly sworn, testified he was chairman of the union grievance committee (Tr. 176). The hearing commenced with Mr. Huff, the hearing officer, reading the letter of suspension. The plaintiff and Mr. DeMattia stated they were ready for the hearing and one of them said "Let's get it over with" (Tr. 177).

Mr. Bowman related the events at the hearing and described the testimony of Mr. Myers, Mr. Hicklin, the plaintiff and Mr. DeMattia (Tr. 178-181). He stated that plaintiff's answers at the hearing were indirect and more or less evasive answers were given (Tr. 181).

Mr. Bowman stated that he received his copy of the notice of the hearing (Exhibit 1; R. 42) the day before the hearing (Tr. 182). The plaintiff said a person is entitled to one mistake (Tr. 186).

Mr. Huff asked the men at the end of the hearing if they had anything further to add (Tr. 190).

MERLE HICKLIN

Mr. Merle Hicklin, a witness for defendant, being duly sworn testified that he was employed in defendant's Industrial Relations department (Tr. 192).

On November 8 he called at plaintiff's house at approximately 10:30 a.m. Plaintiff answered the bell and appeared to be well to Mr. Hicklin. On inquiry as to why he wasn't [fol. 139] at work, plaintiff, after some hesitation, replied "Well, I have got a toothache." (Tr. 193).

The plaintiff stated he hadn't been to see a dentist and in response to a question as to whether he could come in to work in the afternoon said "No, I can't make it this afternoon, my car won't start." (Tr. 194).

Mr. Hicklin took down the Delaware license number of a Ford automobile which was parked in front of the house and which proved to be Mr. DeMattia's (Tr. 195). He testified to the foregoing at the hearing on November 11, 1949 and afterwards the plaintiff called him a few pretty bad names (Tr. 196).

On cross-examination Mr. Hicklin said that the plaintiff was standing in the doorway holding the door which led upstairs open. While Mr. Hicklin was not a doctor, the plaintiff looked well (Tr. 197). The plaintiff didn't say he was sick, he said he had a toothache (Tr. 202).

JOSEPH L. WILSON

Mr. Joseph L. Wilson, a witness for defendant, being duly sworn, testified he had been employed by defendant since August 26, 1942 and had known plaintiff for three years and Mr. DeMattia for four years (Tr. 204).

The plaintiff had met Mr. Wilson the evening before and attempted to discuss the case with him and Mr. Wilson had said he was going to tell the truth (Tr. 205).

[fol. 140] The flight engineer's examination was common knowledge throughout defendant's hangar and Mr. Wilson, along with plaintiff and Mr. DeMattia, was eligible (Tr. 205).

On the afternoon of November 7, 1949 Mr. DeMattia had come to Mr. Wilson at shift change and asked Mr. Wilson to come over to plaintiff's home the next morning to help plaintiff and Mr. DeMattia with their math (Tr. 206).

Mr. Wilson was greeted by plaintiff at the door of plaintiff's home at approximately 10:00 a.m. the next day. The plaintiff looked normal. After Mr. Wilson had been there a few minutes the doorbell rang and plaintiff answered it. When he returned he stated it was a man from Personnel asking why plaintiff wasn't at work (Tr. 207).

Mr. DeMattia was interested and asked what happened. Plaintiff said he had told the man from Personnel that he had a toothache. This was the only mention plaintiff made about a toothache during Mr. Wilson's entire visit and the plaintiff gave no outward appearance of having a toothache (Tr. 208).

The plaintiff seemed well and they all went to work studying for the examination. When Mr. Wilson arrived at plaintiff's home, Mr. DeMattia was already there at the table which was littered with books and papers, pencils and computers (Tr. 209). They had lunch and Mr. Wilson left

at 2:30 since he had to be at work at 3:30. He did not take in plaintiff's application for the examination nor was anything said about it (Tr. 210).

On cross examination Mr. Wilson stated he was now a flight engineer, having passed the November 1949 examination (Tr. 213). It was possible he talked to plaintiff at [fol. 141] shift change on November 7, 1949 but he never talked about the application for the examination. The plaintiff did not telephone him on the morning of November 8, 1949 (Tr. 221). Mr. DeMattia was still at plaintiff's home when Mr. Wilson left at 2:30 p.m. (Tr. 224).

EDWARD HUFF

Edward Huff, a witness on behalf of defendant, being duly sworn testified that he was employed by defendant as Manager of Line Maintenance and had been in defendant's employ 17 years. He conducted the hearing which commenced with a reading of the notice of suspension and plaintiff and Mr. DeMattia stated they were ready. They indicated they did not wish to call any witnesses and plaintiff said "Let's get it over with." (Tr. 227, 228).

Mr. Huff related the testimony of plaintiff, Mr. DeMattia, Mr. Myers and Mr. Hicklin (who was sent to see if plaintiff could come to work when his foreman was short-handed on November 8) as set forth above (Tr. 229-231).

Neither plaintiff nor Mr. DeMattia disputed Mr. Hicklin's testimony (Tr. 231).

"Q. Did you ask, or did Mr. Myers ask, in your presence and hearing, Mr. Koppal as to who had been at his home?

A. Yes.

Q. What was Mr. Koppal's answer?

A. Mr. Koppal stated that Mr. DeMattia had been there, and that Mrs. Koppal had been in and out during the morning.

[fol. 142] Q. Did he at any time mention or intimate that Mr. Wilson had been there for two or three hours that day?

A. No, sir, he did not.

Q. During that entire hearing, will you tell the Court and

jury whether or not Mr. Koppal made any mention about having been sick on the 7th of November?

A. No, sir, he did not." (Tr. 231).

Mr. Parker stated that the plaintiff looked well and worked well on November 7 and November 9. Plaintiff did not indicate he had received any treatment from the nurse but reported of his visit to the nurse with Mr. Myers following his suspension on the afternoon of November 9 at which time the nurse reported his throat as slightly inflamed and he had a slight elevation in temperature, about half a degree (Tr. 232).

"Q. Did he do that at the beginning when you asked him? Or just describe to the jury, what he did about answering those questions concerning what he was doing on the day he laid off?

A. Well, the primary reason for the lengthy hearing was simply that we were unable to get what we considered true statements. Mr. Koppal was very, very evasive, he was defiant on some occasions.

Q. And when you asked him about what he was doing, whether or not he was studying for the flight engineer's, tell the Court and jury whether or not he at first answered that he was studying for that examination.

[fol. 143] A. No, sir, at first he indicated that he was not.

Q. Later did he make the admission that you have just mentioned?

A. No, he did not admit that he was studying for that examination. He did admit that discussions regarding the forthcoming examination were entered into.

Q. Did he ever make any statement about working or doing anything about the examination except with Mr. DeMattia?

A. No, sir.

Q. The representatives of the grievance committee of the union take part in the hearing before you?

A. They did." (Tr. 233).

The hearing commenced at 9:30 in the morning and ended at 3:00 o'clock in the afternoon. Mr. Huff gave the plaintiff and Mr. DeMattia repeated opportunities to bring out other facts and call other witnesses but they stated they did not wish to do so (Tr. 234, 235).

"Q. Now, after you announced your decision, did you have any discussion with Mr. Koppal as to subsequent procedure?

A. Yes.

Q. Just what was that?

A. I explained to both of these gentlemen that the contract provided a four-step grievance process, and that the decision that I had just rendered was only the second step, therefore, there were two additional steps of the grievance procedure that could be pursued if they weren't satisfied with my decision.

[fol. 144] Q. And did you discuss the matter of appeal from your decision with Mr. Koppal?

A. Yes. That is what I indicated, that the third step could be pursued, but it would have to be done within 10 days, and later, after the hearing was finished, Mr. Woodling, who ordinarily handles that sort of thing in the hearing, explained in greater detail how to go about pursuing the additional two steps of the grievance procedure.

Q. Now, you were here yesterday and heard the testimony by Mrs. Koppal and by Mr. Koppal?

A. I did.

Q. Tell the Court and jury whether or not at any time Mr. Koppal mentioned using the hot pad or hot water bottle before your hearing?

A. No, he did not.

Q. Tell the Court and jury whether or not he mentioned at any time that he had taken paregoric in your hearing—at your hearing?

A. No, he did not.

Q. Whether or not he, at your hearing, mentioned that he had taken aspirin?

A. No, sir, he did not.

Q. Whether he mentioned that he had taken digitalis?

A. No, he did not." (Tr. 235, 236).

On cross examination, Mr. Huff stated that plaintiff started the machinery in motion for sick pay by calling in to [fol. 145] the nurse claiming to be sick (Tr. 269). The plaintiff stated he fully intended to make claim for sick pay (Tr. 270).

"Q. Now, did Mr. Koppal or Mr. DeMattia make any kind of a statement or give their version of this matter before Mr. Hicklin testified?

A. Would you repeat the question?

Q. Did Mr. Koppal or Mr. DeMattia testify or give their version, their side of the occurrences on November 8, before Mr. Hicklin testified?

A. They were asked whether or not they had any discussion to offer that would eliminate the confusion that existed, and there was practically no discussion. They were invited to discuss the subject, since there was no further discussion we called Mr. Hicklin.

Q. At what time were they invited to discuss it?

A. Immediately after Mr. Myers finished his statement.

Q. And after you had asked them if they wanted to come clean?

A. Well, that was prior to the time I asked that question. You see—maybe I didn't make myself clear, Mr. Freel, but after Mr. Myers finished his statement I asked these two men whether or not they had any discussion that they would like to offer to clean up some of the confusion that was apparent to me at that time. Since there was no discussion, then we carried on the meeting by calling Mr. Hicklin, and the remark that I made, 'Would you like to come clean?' was just before I called Mr. Hicklin.

[fol. 146] Q. But before Mr. Koppal or Mr. DeMattia had made a statement of any kind?

A. That is right.

Q. All right, sir.

A. I want to make clear, however, that an invitation to them to discuss the subject was made." (Tr. 272, 273).

Mr. Huff stated that Mr. Hicklin testified he arrived at plaintiff's home at approximately 10:30 a.m. (Tr. 274).

"Q. Was there any evidence introduced before you at that hearing to the effect that he was not sick on November 8 other than what Mr. Hicklin said about his having the toothache?

A. Yes.

Q. What was that evidence, sir?

A. I considered these points significant. Mr. Parker and the foreman in the engine shop testified that the afternoon

prior Mr. Koppal appeared to have been very well and he was a very productive person at the time he left work. Mr. Hicklin's testimony was when he arrived at Mr. Koppal's house, that Mr. Koppal appeared to be well. The general knowledge that came out of the discussion that these men we believed to be in the process of studying for flight engineer examination." (Tr. 276).

"Q. Now, did you have any idea that Mr. Wilson back here had been over at Koppal's house on November 8?

A. We knew that there was a third man over there but we didn't now the name of the man.

Q. Now, who told you that there was a third man over there?

[fol. 147] A. It was general knowledge in the shop, Mr. Freel, that this study period was going to come about amongst the mechanics.

Q. You don't work in the shop, do you, Mr. Huff?

A. No, sir.

Q. How did you know that it was general knowledge in the shop that this thing was going to take place?

A. Because Mr. Parker stated that, and Mr. Parker operates directly with the men right on the floor.

Q. And when did Mr. Parker make that statement to you?

A. He made that statement in the meeting, in our hearing.

Q. You are saying that Mr. Parker testified to that effect at the hearing?

A. Yes, sir.

Q. Did Mr. Parker say that he knew that of his own knowledge or was that just hearsay to Mr. Parker.

A. No, that was information that was amongst the mechanics, themselves, that Mr. Parker picked up." (Tr. 280, 281).

"Q. Now, as a matter of fact, Mr. Huff, at the conclusion of that hearing you didn't doubt Mr. Koppal's word that he had a sore throat or a toothache, if he was ill on November 8, 1949, did you?

A. From the evidence before me, Mr. Freel, I felt that Mr. Koppal was certainly not sick enough on the 8th to not report for work." (Tr. 283).

[fol. 148] After the hearing reconvened following the lunch period, Mr. Huff stated it was his decision that there had been a severe case of abuse of the sick pay policy and that it was his decision that the two men would be discharged. In view of their past record he asked them if they would prefer to resign (Tr. 285). The plaintiff was advised he could appeal even though he signed the resignation (Tr. 286).

Narrative of the Testimony of
Mr. Carl G. Johnson and Mr. C. F. Woodling

Appellant's record (R. 95) sets forth appellee's designation of record but fails to set forth the narrative of testimony of Mr. Carl G. Johnson and Mr. C. F. Woodling attached thereto. The following is a copy of such narrative, no objection to which was filed by appellant:

"Narrative of the Testimony of Mr. Carl G. Johnson.

The following narrative of the testimony material to the appeal taken in the above cause is filed as a part of appellee's designation of record on appeal of the above cause in compliance with Rule 75(b) and (c) F.R.C.P.

Mr. Carl G. Johnson, a witness for the defendant, being duly sworn, testified that he had examined the work records of the plaintiff, Mr. Joseph H. Koppal, with the defendant for the period of time involved in this litigation and these records showed that the plaintiff did not work a single hour overtime during this period and as a matter of fact worked [fol. 149] slightly less than 40 hours per week."

"Narrative of the Testimony of Mr. C. F. Woodling.

The following narrative of the testimony material to the appeal taken in the above cause is filed as a part of appellee's designation of record on appeal of the above cause in compliance with Rule 75(b) and (c) F.R.C.P.

Mr. C. F. Woodling, a witness for the defendant, testified that at the time the plaintiff and Mr. DeMattia were suspended from employment with defendant he advised them of their rights under the grievance procedure established by the collective bargaining agreement and read to them the provisions of the agreement in this respect; that, after some discussion as to the date of the hearing, the

plaintiff and Mr. DeMattia agreed that the hearing would be held on November 11, 1949; and that following the hearing on November 11, 1949 Mr. Woodling explained to both plaintiff and Mr. DeMattia how an appeal could be taken and handed them a copy of the collective bargaining agreement for their full information."

Narrative of the Deposition of Edna L. Swink

By Order of the District Judge dated January 22, 1952 the deposition of the witness, Edna L. Swink, read in ev- [fol. 150] dence was made part of the designation of the record in this cause, the same having been read in evidence at the trial. Appellant's record fails to set forth this deposition and the following is a narrative thereof:

Miss Swink was a registered nurse employed by defendant from February 2, 1948 until June 23, 1950.

On November 9, 1949 she examined the plaintiff in the presence of Mr. Leslie Myers. Her examination revealed that the plaintiff had a slight elevation in temperature, about half a degree, and his throat was slightly inflamed. The inflammation observed was a common thing. The plaintiff was very upset and defiant at the time of the examination around 3:30 in the afternoon. She could not remember prescribing anything for plaintiff.

At the conclusion of hearing cross examination by Mr. Freel the following questions were asked:

"Q. Now, I take it from your testimony that you graduated as a registered nurse some time in 1941?

A. Yes.

Q. And you had hospital training of some four years, wasn't it, three years?

A. Three years.

Q. And you have been a practicing registered nurse ever since?

A. Yes.

Q. And you have had experience at some time or another with sore throats during your training and also during your practice?

[fol. 151] A. Yes, sir.

Q. I will ask you if it is not a fact that sore throats in many cases is not a sufficient cause for a man or a woman to remain away from work?

A. That is true.

Mr. Freel: That is all."

Defendant's Trial Brief

Because appellant's designation of record for the first time raised the question as to whether appellee's motion for a directed verdict sufficiently apprised the District Judge as to the reasons therefor, appellee's designation of record included its trial brief. No objection to this designation was filed by appellant but appellant's record fails to set forth the trial brief. The following brief excerpts of this trial brief are included to show that the District Judge was fully apprised of the reasons for appellee's motion:

"1. *Plaintiff having resigned, cannot maintain this action.*

At the conclusion of the hearing, the hearing officer indicated that it was his opinion that the plaintiff had violated the sick leave provisions of the contract, and should be discharged. However, before rendering a decision to that effect, the hearing officer, with a view of relieving plaintiff of embarrassment in seeking other employment, gave the plaintiff an opportunity to resign. The plaintiff [fol. 152] then elected to resign and handed in his resignation. Immediately thereafter he was advised that he had the right of appeal, as provided in the contract, and the provisions about appeal were read to him, and he was handed a printed copy of the contract. The plaintiff failed and refused to exercise his right of appeal. Instead he stood upon his resignation, and, therefore, is precluded from maintaining this action."

"Even if defendant's hearing officer had rendered a decision of dismissal against plaintiff, plaintiff's sole remedy would have been to appeal under the collective bargaining agreement. Under Missouri decisions (and Missouri law

applies to this contract made and executed between defendant and the International Association of Machinists in Kansas City, Missouri, on March 22, 1949, *Erie R. Co.* v. *Tompkins,* 304 U. S. 64) it is required that plaintiff pursue his remedy under the collective bargaining agreement. *Reed* v. *St. Louis S.W. R. Co.* 95 S.W. (2d) 887 (App. 1936)."

"Even assuming arguendo, that plaintiff is not precluded from recovery because of his resignation, plaintiff cannot possibly sustain the burden of proving that he was discharged without a fair hearing. Although not obligated to do so, defendant will show that the hearing officer's decision was correct, and it is respectfully submitted that the Court should direct a verdict in favor of the defendant."

[fol. 153] **Proceedings in the U.S.C.A., ~~Ninth~~ Eighth Circuit**

APPEARANCES

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Counsel for Appellant)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14473

JOSEPH H. KOPPAL, Appellant,

vs.

TRANSCONTINENTAL AND WESTERN AIR, INC., a Corporation,

The Clerk will enter my appearance as Counsel for the Appellant.

Fred J. Freel, Ray D. Jones, Jr.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 7, 1952.

(Appearance of Mr. Harold L. Warner, Jr., as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

Harold L. Warner, Jr., c/o TWA, 20 West 9th Street, Kansas City, Mo.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 24, 1951.

[fol. 154] Appearance of Mr. Ruby D. Garrett as Counsel for Appellee.

Comes now Ruby D. Garrett and enters his appearance as additional attorney for appellee in the above-entitled cause.

Dated this 5th day of February, 1952.

Ruby D. Garrett, 822 Scarritt Building, Kansas City, Missouri.

Approved: Harold L. Warner, Jr., Attorney for Appellee.

(Endorsed): Filed in U. S. Court of Appeals, Feb. 6, 1952.

In United States Court of Appeals

Order of Submission

September Term, 1951, Friday, March 7, 1952.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Ray D. Jones, Jr., for appellant, continued by Mr. Ruby D. Garrett and Mr. Harold L. Warner, Jr., for appellee, and concluded by Mr. Fred J. Freel for appellant.

Thereupon, this cause was submitted to the Court on the typewritten record of appellant, the typewritten supplemental record of appellee and the typewritten briefs of counsel filed herein.

[fol. 155] UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14,473.

JOSEPH H. KOPPAL, Appellant,

vs.

TRANSCONTINENTAL AND WESTERN AIR, INC., a Corporation, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

OPINION—October 6, 1952

Ray D. Jones, Jr., and Fred J. Freel for Appellant.
Ruby D. Garrett and Harold L. Warner, Jr., for Appellee.

Before Johnsen, Riddick and Collet, Circuit Judges

JOHNSEN, Circuit Judge

An employee sued to recover damages from his employer for wrongful discharge. The jury returned a verdict in [fol. 156] favor of the employee for $7500. The court, on motion by the employer for judgment notwithstanding the verdict or in the alternative for a new trial, entered an order setting aside the verdict, giving judgment for the employer, and further providing that, if this judgment was reversed on appeal, then the employer was granted a new trial, unless the employee filed a remittitur of $6200. The employee has appealed.

The action was one predicated upon breach of the provisions of a collective bargaining agreement made between the employer and a labor union, under the Railway Labor Act, Title II, 45 U.S.C.A. §§ 181 et seq. The employer was subject to the Act as a carrier by air. The labor union was the bargaining agent pursuant to the Act of the class of employees of the carrier to which the plaintiff belonged, although plaintiff himself was not a member of the union.

The claimed breach consisted (1) in having deprived

plaintiff, "without just cause or reason," of the rights of job, seniority, pension and other fringe benefits, as alleged to be impliedly vested in him by the agreement, and (2) in having discharged him "without a fair hearing," as expressly provided for in the agreement.

The agreement did not prescribe what should constitute grounds for discharging an employee and thereby depriving him of the rights existing in his favor under the agreement. It accordingly left the question of cause subject to general legal standard within the realities of the contract situation. As to process, however, there was an express provision that a discharge could not be made "without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee" and that "At a reasonable time prior to the hearing, such employee and his duly authorized represent-
[fol. 157] ative will be apprised, in writing, of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses."

Plaintiff was discharged for abuse of the carrier's sick-leave privileges, which entitled employees who had completed six months or more of continuous service to be absent from work for illness, without loss of pay, to the extent of one day for each month of continuous service, cumulative up to a total of 60 days at a time. The contract implicationally provided that "The employees covered by this Agreement, and the Union, recognize an obligation to be truthful and honest and to prevent unnecessary absences and other abuses of sick leave privileges."

The manager of the carrier's "Overhaul Base" in Kansas City, where plaintiff was employed, had accused plaintiff of absenting himself from his work and reporting that he was ill, with intention to collect sick-leave benefits, when he was not in fact ill but was merely taking time off to serve his own convenience. Another employee, who was a friend of plaintiff, had at the same time absented himself and reported illness. When a representative from the employer's "Industrial Relations Department" made an unexpected call at plaintiff's home, plaintiff himself answered the door, and the automobile of the other employee was found standing in front of plaintiff's house.

Upon the return of the two employees to work, they were directed to go to the manager's office, where they were interrogated about the reason for their absence. Both insisted that they had been absent because they were not feeling well enough to work, but they subsequently admitted that, notwithstanding their alleged illness, they had used the occasion to prepare for an examination, which was to be held within a few days, as a qualification for a higher position. Plaintiff also later admitted that a third employee [fol. 158] had joined them in their preparation efforts, but he refused to disclose the name of this employee and asserted that the meeting had not been planned but was purely one of coincidence. The manager declared at the close of the interview that he thought that the two employees were lying about their alleged illness and said that he was going to suspend them until a hearing could be held to air the matter, the time for which he fixed as the second day following.

The two employees appeared at the time set, and an informal hearing was held before the "manager of Line Maintenance." The record shows, however, that the evidence produced at this hearing was such that, if the hearing was not otherwise subject to impeachment—a question which will be later considered—anyone called upon to hear and weigh the testimony and circumstances could properly conclude and find therefrom that plaintiff had not been honest in this claim of illness and had been guilty of abusing his sick-leave privileges. Nor upon the evidence introduced on the court trial did there exist any basis for a jury to declare that this abuse had not constitu-ed the actual reason for the discharge, such as might perhaps be entitled to be done in some equivocal situation of employer motive as related to the purposes of the Act or the provisions of the agreement. And since, as suggested above, the contract had left the question of cause as one of general legal standard applied to the realities of the contract situation, it also would have to be held that plaintiff's dishonest abuse of his sick-leave privileges, as an existing fact and without improper pretext in its use by the employer, constituted in the situation as a matter of law a sufficient ground for his discharge.

Plaintiff was accordingly, we think, not entitled to have a jury resolve whether he was discharged "without just [fol. 159] cause or reason," because, as indicated, the evidence legally required the holding that he was discharged for dishonest abuse of the sick-leave privilege, and the contract had left that ground, under proper motive, as a sufficient legal basis for the action which the employer took. Thus, any submission to the jury of that question was in the present situation simply giving the jury an artificial opportunity to veto managerial prerogative and its legitimate exercise.

Plaintiff's second claim of contract breach, as previously noted, was that the discharge had been made "without a fair hearing." In this connection we repeat the provision of the agreement that a discharge should not be made "without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee" and that "At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised, in writing, of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses."

In so far as the term "fair hearing" in its use in this provision could be said to imply that a discharge should depend, not simply upon whether cause might exist in fact, but rather upon whether proof of the existence of such cause was sufficiently made against the employee at a hearing as to be capable of inducing and to have constituted the basis of the employer's action, what we have said above is here equally controlling of plaintiff's lack of right on the evidence to have these questions attested by a jury as a matter of "fair hearing." No more on this particular aspect than on the general question considered above, does the evidence afford any basis for a jury to say that sufficient cause legally for discharge was not proved or that the employer's action was not taken on the basis of this proof. It should be added also that the question of bias or prejudice in the [fol. 160] hearing officer as an element of "fair hearing" is not here involved.

If therefore any jury question existed in the situation in relation to the contractual provision for "fair hearing", it would only be because of the impossibility of saying as a

matter of law that all of the processes which the agreement required to underline the hearing, and which accordingly constituted incidents thereof, had been properly complied with, and so a legal doubt could exist as to the significance of such omission or deviation as had occurred, which the employee was entitled to have appraised in relation to whether on all the circumstances there had been a breach of the prescription for "fair hearing" with its intended incidents, and whether the employee had been prejudiced thereby.

Evidence is contained in the record from which it properly could be found as a fact that no other notice was given plaintiff of the hearing except the oral statement of the manager, after his interview with the two employees, fixing the second day following for an airing of the matter; that the hearing was set for the manager's office and no intention was expressed to have it held by some other officer—another officer being required under the contract only in relation to a discharge proceeding; that no suggestion was made to plaintiff that his job might be in jeopardy or that it would be advisable for him to have any witnesses present who could corroborate his story as to his illness; that the impression which plaintiff received from all the circumstances was simply that the session was to constitute a fuller airing of the situation, or, as he termed it, "a scare session;" that he thus did not undertake to get the union or anyone else to represent him or to have witnesses present who, he claimed, could have substantiated the fact that he actually was ill and had not lied about the [fol. 161] reason for his absence; that, while a representative of the union appeared at the hearing, he did not attempt to confer with plaintiff or to advise him or intercede for him or to bring out his years of job service and previous record of satisfactory relationship; that the union representative's only interest throughout the course of the hearing seemed to be in the problem of absenteeism as it related to union members—of which plaintiff was not one—and the union's attempt to deal with it among its members; and that plaintiff had not realized, either before or through the hearing, that the matter of his discharge was being considered and thus was caught unawares when the hearing

officer announced at the close of the hearing that he was persuaded from the evidence presented that plaintiff had been guilty of dishonest abuse of the sick-leave privileges and that he felt that plaintiff should be discharged.

There also was evidence from which a jury could have found that plaintiff appreciated the purpose and significance of the hearing and chose to go ahead with the proceeding on that basis in the manner in which he did. But if the jury found the facts to be as plaintiff contended, it could not be declared as a matter of law that the provisions of the contract for giving written notice of the precise charge and for affording reasonable opportunity to secure the presence of necessary witnesses in relation to such a possible discharge-result had not been so violated as to constitute a possible and prejudicing breach in the situation. A court would not be entitled to rule that it could not matter in any case of discharge whether the notice of hearing given had been oral or written, for the contract in requiring written notice as a basis for discharge plainly had the purpose, not merely of assuring that an employee would be apprised of the precise charge against him, but also of specifically challenging his attention by the form of [fol. 162] the notice to the fact that the jeopardy of discharge was involved.

Complaints, grievances and charges about various matters would naturally arise in the course of the employer-employee relationship, which probably would be made the subject of attempted airing, sifting and resolution, but only as to hearings in which the action of discharge might be involved was the employer required to give the employee a written notice. Thus, failure to receive a written notice might well, as plaintiff claimed it had done in his situation, deceive an employee as to what he was facing and mislead him as to the need for making preparation, arranging for representation, and securing the presence of necessary witnesses, and so would be capable of working what might amount in the realities of the situation to a deprivation of these intended privileges under the contract, with the employer being chargeable with knowledge of the possible prejudice being effected from its failure to have given the required written notice.

No doubt all of these rights and incidents under the contract were also matters which an employee would be privileged to waive, if he so desired. But such a waiver, like any other, would not be entitled to be held to exist except upon knowledge or understanding on the part of the employee sufficient in the situation to constitute legal responsibility and choice in relation to what the employee was claimed to have waived. The evidence which has been set out above would not under the circumstances permit it to be declared as a matter of law that, in having participated in the hearing, in not having requested a postponement, in having submitted the matter without calling other witnesses, etc., plaintiff had appreciated and waived the effect of his failure to receive written notice, with its implication of the need to make preparation, arrange for [fol. 163] representation, and secure the presence of necessary witnesses, and so could not claim any breach of the provision of the contract for being given written notice and being afforded a reasonable opportunity to secure the presence of witnesses. At most, the question of whether such a waiver had been made and existed in fact constituted on all the evidence a question for the jury.

We therefore think that the case presented a question for the jury on whether there had been such a violation of the contract provisions referred to as amounted in the situation to a breach of the prescriptions intended to underlie and attend any hearing on which a discharge would be based.

Some attempt has been made by the employer to argue that plaintiff was not in fact discharged but that he resigned. It appears from the record that, after the hearing officer had reached his conclusion in the matter, he told plaintiff that, if he preferred not to be formally discharged, he would be permitted, in view of his previous good record, to sign a resignation blank. Plaintiff asked to be allowed to have the resignation blank show that such a resignation would be made under protest. The hearing officer refused to let any such notation be made on the blank. Plaintiff then orally declared that he was signing the blank under protest. The trial court instructed the jury in substance that, if plaintiff had in effect been forced to resign or be

discharged and had not voluntarily signed the resignation blank but only in acceptance of the milder form of an inescapable result, then his purported resignation was in the situation simply tantamount to a discharge, but that the jury had the right to say in the situation whether the resignation was in fact given voluntarily or equivalently as a compelled discharge. This instruction was not made the subject of an exception, nor do we think that it basically [fol. 164] could have been made so in the circumstances involved. The employer's contention that there was no discharge does not call for further consideration here.

One further question is necessary to be considered in determining whether the court erred in sustaining the employer's motion for judgment notwithstanding the verdict. The motion was sustained, not in relation to the questions which we have previously considered, but on the basis of the court's view, arrived at after the jury had returned its verdict, that no justiciable right to sue for breach could be recognized as existing in the situation, because there had been no preceding resort to and exhaustion of the administrative remedies which were available under the contract.

The contract provided that "appeal may be made * * * to the Chief Operating Officer of the Company or his authorized representative," and it prescribed the steps necessary for the taking of such an appeal. It further provided that, if the decision on such an appeal "is not satisfactory to the Union, the matter may be referred by the System General Chairman [of the Union] to the System Board of Adjustment * * *." It was these provisions for the administrative correction of such wrong as might have been done plaintiff that the court held he was required to exhaust, before he would be entitled to maintain any action for damages.

The court seems to have arrived at this conclusion upon the premise that the agreement involved was a contract made pursuant to and subject to Missouri law, and that under Missouri law the substantive right of recovering damages for wrongful discharge was not enforceable, so long as there existed administrative remedies under the contract which had not been exhausted. See *Reed* v. *St. Louis Southwestern R. Co.*, Mo. App., 95 S. W. 2d 887.

[fol. 165] The collective bargaining agreement, however,

was not one whose administrative-remedy provisions had their source in or were subject to appraisement on the basis of state law. The contract was one made under and pursuant to the prescriptions of the Railway Labor Act, Title II, 45 U.S.C.A. §§ 181 et seq. Recitation of that fact is made in its preamble, and its body contains a specific provision that "Nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded either to the employees or to the Company or to their duly accredited representatives, under the provisions of the Railway Labor Act." Furthermore, the administrative-remedy provisions of the agreement conform directly to the requirements of the Act.

45 U.S.C.A. § 184, in the portion here material, provides that "The disputes between an employee or a group of employees and a carrier or carriers by air growing out of grievances * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes." The section further mandatorily provides for the setting up of "a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional (railroad) boards of adjustment, under the authority of section 153 of this title." The provision that disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier" is copied from and is a counterpart of 45 U.S.C.A. § 153(i), applicable to railroad carriers.

[fol. 166] The nature and effect of the provisions for the administrative adjustment of disputes contained in the contract are therefore questions relating to the Railway Labor Act and not to Missouri law. And what the nature and effect of such provisions in a contract made under the Railway Labor Act are has been concludingly settled by the Supreme Court.

In *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 634-636, 61 S.Ct. 754, 85 L.Ed. 1089, the question was presented un-

der the sections of the Act applicable to railroad carriers, corresponding to those here involved applicable to carriers by air. In that case, as the opinion indicates, the collective bargaining agreement, like the one here, contained a provision "authorizing Moore (the discharged employee) to submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officers of the company," etc. The Court related this provision to 45 U.S.C.A. § 153(i) and the language thereof, as under 45 U.S.C.A. § 184 here, that disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," etc. None of this, however, the Court said, could be regarded as constituting machinery for settling disputes on a contract under the Railway Labor Act "on a philosophy of legal compulsion" but was intended merely "to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature." And so, the Court declared, "The District Court and the Circuit Court of Appeals properly decided that petitioner (the discharged employee) was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge," 312 U.S. at page 636. See also *Slocum* v. *Delaware, L.&W.R. Co.*, 339 U.S. 239, 244; *Texas & N. O. R. Co.* v. *McCombs, Tex.*, 183 S.W.2d 716, 719.

[fol. 167] In the face of this declaration and construction, Missouri would not, of course, be at liberty to hold contrarily that the adjustment provisions of a contract made under and pursuant to the Railway Labor Act were compulsory in nature and constituted conditions precedent to the right to sue for wrongful discharge in an employment relationship covered by the Act. Missouri law applicable to employment relationships would be without application to relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act. So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained.

For these reasons, the trial court erred in granting, on the basis of the holding in *Reed* v. *St. Louis Southwestern R. Co.*, Mo. App., 95 S.W.2d 887, the employer's motion for judgment notwithstanding the verdict. It should be added also that, in view of the Moore case, supra, *Harrison* v. *Pullman Co.*, 8 Cir., 68 F.2d 826, decided prior thereto, can no longer be regarded as reflective of the law on the need to exhaust administrative remedies as a prerequisite to a suit for wrongful discharge under a contract made under and pursuant to the Railway Labor Act.

What we have said requires that the court's order sustaining the employer's motion for judgment notwithstanding the verdict and the judgment for defendant entered on the basis thereof be reversed. This leaves the situation upon remand subject to the alternative order of the court, granting a new trial unless plaintiff files a remittitur of [fol. 168] $6200. In connection with this order, the court stated that such action was being taken because the jury had been permitted by the instructions to make its verdict include damages for mental anxiety, loss of seniority rights, vacation pay, transportation privileges, longevity accruals, and other fringe benefits, which on fuller consideration the court regarded as not constituting proper elements of recovery under Missouri law. The amount to which the verdict was cut represented, in the court's view, all the pecuniary loss which the evidence established that plaintiff had sustained from his discharge.

We are asked by plaintiff to make expression upon the correctness of these views of the trial court. The granting of a new trial is of course not as such a reviewable order. Any expression upon the questions involved in the court's ruling would therefore be a matter of grace and not of right. But we are not satisfied upon the briefs before us to make any foreclosing expression, and we do not feel called upon to engage in the voluntary exhaustive research which would be necessary, and to which we would be obligated to resort, were the questions matters of right. To undertake so to do at the present time would be to slight other cases in which questions remain to be answered as a matter of right. Our consideration therefore has extended no farther than the material in the briefs, and on that material we would

not be able to say that the trial court's appraisal of Missouri law as to the nature and extent of damages recoverable for a wrongful discharge was erroneous. This observation, however, is made without commitment and without prejudice to the position of the parties or the course of the trial court in any subsequent proceedings.

Reversed and remanded for further proceedings.

[fol. 169] COLLET, Circuit Judge concurring:

I agree that Missouri law is not controlling in this case and that the case of *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089, is. Hence, I concur in the result remanding the cause for further proceedings.

I believe that the question of just cause was properly a jury question under the circumstances.

I am of the opinion that under the circumstances and in view of the fact the case is properly before us, we should give the trial court the benefit of our judgment concerning the correctness of its conclusion relating to the measure of damages and the propriety of the alternative order directing a remittitur.

RIDDICK, Circuit Judge, dissenting:

My disagreement with the majority in this case follows from my conclusion as to the character of the action and the basis of the jurisdiction of the District Court.

Appellant was employed by appellee, a carrier subject to the Railway Labor Act, under a collective bargaining agreement between appellee and a union representing its employees. The contract provided that appellant could not be discharged without a fair hearing before an officer of the appellee other than the one bringing the charge against him, that at a reasonable time prior to the hearing the appellant would be given notice in writing of the precise charge against him and a reasonable opportunity to secure the presence of necessary witnesses, and that if the appellant was not satisfied with the decision of the hearing officer he

[fol. 170] had the absolute right of appeal to the highest executive officer of appellee.

Appellant was charged with violation of the appellee's sick leave rule set out in the contract of employment, was tried, found guilty, and discharged. He brought this action against appellee for damages, actual and punitive, for an alleged breach of his contract of employment.

The only breach of the contract alleged in the complaint is that "plaintiff was discharged without a fair hearing, that he was not notified in writing of the precise charge against him, and that he was not given a reasonable opportunity to secure the presence of witnesses at a hearing prior to the time of his discharge." Appellant alleged that if given notice and opportunity he would have produced witnesses and would have proved that he was not guilty of the charge against him; and that as the result of appellee's breach of the contract of employment, appellant was damaged by the loss of wages and of his seniority and pension rights and other benefits to which he was entitled under the contract.

At the trial in the District Court there was evidence on behalf of appellant from which the jury might have found that he did not receive notice in writing of the precise charge against him; but the evidence also shows without dispute that appellant was interviewed at length by the officer who preferred the charge against him, that he was fully apprised of the nature of the charge, that he understood it, that his trial before the hearing officer was set for a day which appellant requested, that it lasted for five hours with an adjournment for lunch, that appellant was present at the trial and testified, and that he not only called no witnesses, although they were readily available, but [fol. 171] concealed the identity of one witness who was familiar with the facts on which the charge was based.

The record also shows without dispute that at the conclusion of the trial the hearing officer announced a verdict of guilty on the charge, ruled that cause for appellant's discharge was stated in the charge, advised the appellant of his absolute right to appeal to a higher officer of the company; and that appellant, refusing to appeal, brought this action for damages. In the District Court there was a jury

verdict for the appellant which on motion of the appellee the court set aside and entered judgment for appellee. This appeal followed.

I think it follows from what has been said that on the pleadings the only and controlling issue to be submitted to the jury was whether appellant had received a fair trial of the charge against him to which he was entitled under his contract of employment. The jury in the District Court was not entitled to substitute its judgment for that of the tribunal provided in the contract of employment on the question whether the charge against appellant stated grounds for discharge, or upon the question whether the evidence before the appointed tribunal was sufficient to sustain its verdict, since there was substantial evidence to support it. To this extent I agree with Judge Johnsen, as well as with his disposition of appellant's request for a ruling on the correct measure of damages for the alleged breach of contract.

As I read the record I find no evidence to sustain appellant's charge that he was denied a fair trial in accordance with the contract on which he relies. The District Court could have granted the motion for judgment notwithstanding the verdict on that ground alone. But the District Court, being of the opinion that the substantive law of [fol. 172] Missouri controlled, gave as his reason for granting the appellee's motion the appellant's admitted failure to appeal from the adverse decision of the hearing officer and thus to exhaust the remedies provided by the contract on which he sued. And it is this ruling which the court now finds erroneous and for which it reverses and remands the case.

Ordinarily an appellate court is not concerned with the reasons which a trial court gives for a correct decision. But because of the question now to be discussed, which goes to the very character of the action and the jurisdiction of the District Court, I think it not improper for me to state my reasons for the conclusion that the District Court was correct in applying local law in the action before it.

This action is not one arising under the laws of the

United States of which the District Court has jurisdiction under Title 28, U.S.C., Section 1331. The action is one of which the District Court has jurisdiction solely because of diversity of citizenship and the sum in controversy. *Burke* v. *Union Pac. R. Co.*, 10 Cir., 129 F. 2d 844; *Starke* v. *New York, Chicago & St. Louis R. Co.*, 7 Cir., 180 F.2d 569. Appellant, a citizen of Kansas, sued the appellee, a citizen of Delaware, in a District Court sitting in Missouri to recover damages in excess of $3,000 for appellee's alleged breach of a contract of employment of appellee executed and to be performed in Missouri. Nothing in the Railway Labor Act is controlling or even pertinent to the question to be decided. The District Court was correct in holding that the controlling substantive law was that of Missouri concerning which there is no dispute. *Reed* v. *St. Louis, Southwestern R. Co.*, Mo. App., 95 S.W.2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F.2d 826.

There is nothing in *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, which requires or even suggests any other con- [fol. 173] clusion. In the *Moore* case the Supreme Court sustained the exclusive jurisdiction of a District Court in a diversity suit brought by an employee against his employer to recover damages for an alleged breach of a collective bargaining agreement entered into pursuant to the Railway Labor Act, even though it was necessary to decision that the District Court construe the collective bargaining agreement. *Marchitto* v. *Central R. Co. of New Jersey*, 9 N.J. 456, 88 A.2d 851. The Court of Appeals was reversed for its refusal to apply State law, and in a later case brought by Moore against the same employer, arising out of the same transaction as the first, the Court of Appeals applied the law of the State in which the action arose and was brought. *Moore* v. *Illinois Central R. Co.*, 5 Cir., 136 F.2d 412, 413.

It is true that in the *Moore* case the Supreme Court said that the right of an employee to sue an employer for damages for breach of a collective bargaining agreement of employment was not dependent upon the prior exhaustion of the employee's administrative remedies under the Railway Labor Act. But to give that statement the meaning

which the majority attribute to it is to lift it out of context and to ignore the difference in character between rights and remedies available to an employee before the Adjustment Board under a contract made pursuant to the Railway Labor Act, and those available to him in a common law action for damages for the breach of such a contract. This distinction is made plain in the opinion of the Supreme Court in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 244, and in *Order of Railway Conductors* v. *Southern R. Co.*, 339 U.S. 255, and is recognized in the decision of this court in *Priest* v. *Chicago, R. I. & P. R. Co.*, 189 F.2d 813, 815.

In the *Slocum* case the action was by a railroad company for a declaratory judgment interpreting collective bargain- [fol. 174] ing agreements with two unions of its employees. The Supreme Court held that the jurisdiction of the Adjustment Board under the Railway Labor Act of grievances arising under the bargaining agreements was exclusive, but it expressly held that the decision was not in conflict with the *Moore* case, saying (p. 244):

"Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide * * *."

Since a proceeding under the Railway Labor Act before the Adjustment Board and an action at law in a District Court for damages for breach of contract are wholly different in character, assert different rights, and seek different remedies, in separate tribunals of mutually exclusive jurisdiction, it can not be said that before resorting to one action the litigant must first resort to the other. Where either action is available, the litigant has his choice. That is all the *Moore* case stands for. It certainly does not stand for the proposition that in an action for damages for breach of a Missouri contract, tried in a District Court in Missouri

whose jurisdiction is based solely upon diversity of citizenship and the sum in controversy, the substantive law of Missouri is not controlling.

I would affirm the judgment of the District Court.

[fols. 175-187] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOSEPH H. KOPPAL, Appellant,

vs.

TRANSCONTINENTAL AND WESTERN AIR, INC., a corporation

JUDGMENT—October 6, 1952

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause entered June 7, 1951, be, and the same is hereby, reversed with costs; and that Joseph H. Koppal have and recover against Transcontinental and Western Air Inc., a corporation, the sum of Twenty-five ($25.00) Dollars for his costs in this behalf expended and have execution therefor.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for further proceedings consistent with the opinions of this Court this day filed herein.

October 6, 1952.

[fol. 188] IN UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION OF APPELLEE FOR REHEARING—November 10, 1952

Petition for Rehearing filed by Appellee in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

November 10, 1952.

IN UNITED STATES COURT OF APPEALS

MOTION OF APPELLEE TO STAY ISSUANCE OF MANDATE—Filed November 14, 1952

By order of this Court entered on October 6, 1952, the order of the District Court dismissing the complaint in this action was reversed and the cause remanded for further proceedings. Appellee duly filed petition for rehearing, which petition was denied by this Court pursuant to order entered November 10, 1952. In accordance with Rule 16(b) of this Court, the mandate would ordinarily issue and be sent to the Clerk of the United States District Court at Kansas City on November 20, 1952.

Transcontinental and Western Air, Inc., a corporation, appellee herein, respectfully shows to the Court that it intends to apply, within the time provided by law, to the Supreme Court of the United States by petition for certiorari for a review of the opinion and judgment of this Court in the above cause.

Because of the state of the record in this case[1], appellee herein will be confronted with a difficult problem in attempting to file a record in the United States Supreme [fol. 189] Court conforming to the rules of that Court. Furthermore, appellee will be unable to complete its petition for certiorari and supporting brief until appropriate record references can be made to the printed record to be filed in the Supreme Court. In view of these unusual cir-

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[1] Only a single typewritten copy of the record is on file in this Court, appellant having been given leave so to proceed by order of this Court entered on January 15, 1952.

cumstances appellee requests that the provisions of Rule 16(c) of this Court ordinarily limiting a stay of mandate to thirty days be waived so that appellee may have adequate time to prepare an appropriate record in conformance to the rules of the United States Supreme Court.

Wherefore, the said appellee prays this Court that an order be entered staying the issuance of the mandate herein until the disposition of the aforesaid petition for certiorari.

Respectfully submitted, Ruby D. Garrett, Attorney for Appellee, 822 Scarritt Building, Kansas City 6, Missouri, Harold L. Warner, Jr., Attorney for appellee, 20 West Ninth Street, Kansas City 6, Missouri.

Copy of the above Motion to Stay Mandate received this 13th day of November, 1952, Fred J. Freel, By M. Peterson, Attorney for Appellant, 900 Bryant Building, 1102 Grand Avenue, Kansas City 6, Missouri.

[File endorsement omitted.]

[fol. 190] In United States Court of Appeals

Order Staying Issuance of Mandate—November 20, 1952

On Consideration of the motion of the appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

November 20, 1952.

[fol. 191] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 192] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 509

TRANSCONTINENTAL & WESTERN AIR, INC., Petitioner,

vs.

JOSEPH H. KOPPAL

ORDER ALLOWING CERTIORARI—Filed February 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, limited to questions 1 and 2 presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 509

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

vs.

JOSEPH H. KOPPAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Specifications of Errors to Be Urged	8
Reasons for Granting the Writ	9
Argument	12
1. The result reached below is contrary to the decision of this Court in the *Moore* case	12
2. The Court of Appeals failed to apply local law on the subject of notice	19
Conclusion	22
Appendix A	23

Table of Authorities

Cases

Bell v. Western Ry. Co., 228 Ala. 328, 153 So. 434	9, 15
Butner v. Union Pac. R. Co., 236 Mo. App. 1134, 163 S. W. 2d 100	21
Davis v. Union Pac. R. Co., 21 CCH Labor Cases ¶66,834 (D. Neb.)	10

PAGE

Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282 18

Eminent Household of Columbia Woodmen v. Ramsey, 118 Miss. 454, 79 So. 351 15

Eminent Household of Columbian Woodmen v. Payne, 18 Ala. App. 23, 88 So. 454 15

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 ..... 10, 16, 17, 18

Harrison v. Pullman Co., 8 Cir., 68 F. 2d 826 .. 6, 7, 8, 9, 10, 11, 13, 17

Independent Order of Sons & Daughters of Jacob v. Wilkes, 98 Miss. 179, 53 So. 493 15

Johnson v. The New York, New Haven and Hartford Railroad Co., — U. S. —, 97 L. Ed. (Advance p. —), 73 S. Ct. 125 11

Keller v. Western Ry. Co., 228 Ala. 336, 153 So. 441 ..... 9, 15

Moore v. Illinois Central R. Co., 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754 ..... 2, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19

Moore v. Illinois Cent. R. Co., 180 Miss. 276, 176 So. 593 ..... 9, 14, 15

Moore v. Illinois Cent. R. Co., 24 F. Supp. 731 (S. D. Miss.) 17

Reed v. St. Louis S. W. R. Co., Mo. App., 95 S. W. 2d 887 ..... 6, 7, 8, 9, 10, 11, 13, 17

Roberts v. Thompson, 107 F. Supp. 775 (E. D. Ark.) 10

Sinclair Prairie Oil Co. v. Dose, 189 Okla. 569, 118 P. 2d 210 9

PAGE

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577 ..... 2, 10, 14, 17

Texas & N. O. R. Co. v. McCombs, 143 Tex. 257, 183 S. W. 2d 716 9

Wallace v. Southern Pac. Co., 106 F. Supp. 742 (N. D. Calif.) 9

STATUTES

28 U. S. C. §1254 (1) 2

Title II, Railway Labor Act, 49 Stat. 1189, 45 U. S. C. §§181 et seq. 3, 12, 23-27

OTHER AUTHORITIES

Merrill on Notice (1952) 21

IN THE

Supreme Court of the United States

October Term, 1952

No.

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

vs.

JOSEPH H. KOPPAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Transcontinental & Western Air, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on October 6, 1952.

Opinions Below

The opinion of the District Court (124-130)* has not been reported. The opinion of the Court of Appeals revers-

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* Unless otherwise stated, references in parentheses are to pages of the record and italics are ours.

ing the judgment of the District Court (164-180) is reported in 199 F. 2d 117.

Jurisdiction

The judgment of the Court of Appeals was entered on October 6, 1952 (180). A petition for rehearing filed on October 20, 1952 was denied on November 10, 1952 (181). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.

2. Whether the decisions of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, bar the application of state law requiring an employee to attempt to adjust his dispute with his employer before he may seek redress in state courts for alleged breach of a collective bargaining agreement made pursuant to the Railway Labor Act.

3. Whether the Court of Appeals, under the circumstances revealed by the record, decided an important question of local law in a way probably in conflict with applicable local decisions when it held that respondent had not waived the contract requirement of notice of hearing as a matter of law.

Statute Involved

The pertinent provisions of Title II Railway Labor Act, 49 Stat. 1189, 45 U. S. C. §§181 *et seq.*, are printed in Appendix A, *infra*, pp. 23-27.

Statement

Respondent Koppal brought action in the United States District Court for the Western District of Missouri, Western Division, based on diversity of citizenship, claiming that he had been wrongfully discharged contrary to the terms of a collective bargaining agreement between petitioner and International Association of Machinists, a union representing the mechanics and related employees in the service of petitioner (1-18). Respondent was not a member of the union (2, 137). Petitioner as a carrier by air was subject to the Railway Labor Act and the contract was made pursuant to the Act so far as applicable (2, 19). It was stipulated by the parties that the contract was a Missouri contract (125).

Respondent in his complaint prayed for actual damages in the sum of $7,500 and for punitive damages in the sum of $15,000, averring that according to the union contract seniority, job and employment rights were vested in him of which he could not be deprived without just cause or reason. The union contract (Ex. A, 29-30, 31-88) did not prescribe what should constitute grounds for discharging an employee but respondent averred that he was wrongfully and unlawfully discharged for an alleged violation of the sick leave rule, that he was discharged without a fair hearing, was not notified in writing of the precise

charge against him and that he was not given a reasonable opportunity to secure the presence of witnesses at a hearing prior to the time of his discharge (1-18).

Upon the trial in the District Court, the following facts were established:

Respondent and one DeMattia, a fellow worker, were suspended from employment by petitioner on November 9, 1949, on the charge of abuse of sick leave pay privilege under the union contract (135; Ex. 1, 29-30, 88-89; Ex. A, Art. XVII (j), 80).

Immediately following their suspension, respondent and DeMattia were orally notified (135, 159) that a hearing would be granted them pursuant to the provision of the union contract governing discharge (Ex. A, Art. XI (b) (10), 67-68), which provides that:

> "No employee who has been in the service of the Company ninety (90) days or more shall be discharged without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee."

The hearing was set for November 11, 1949, that date having been agreed upon with respondent (135). A letter was also written to respondent and the union grievance committee notifying them of the hearing (Ex. 1; 88-89). While the union stated that its copy was received on November 10 (152), respondent testified that he did not receive his copy until November 12 (97, 136), the day following the hearing. In any event respondent voluntarily attended the hearing on November 11, heard the written notice read and stated he was ready to proceed (97, 136, 151, 152, 154).

Evidence was presented at this hearing that respondent and DeMattia were both absent from work on November 8, 1949 (133, 140). Being shorthanded their foreman sent to see if they could report to work that afternoon (154), resulting in the discovery that respondent and DeMattia, who was discovered at respondent's home on the day of the alleged illness, had met by prearrangement to prepare for an examination for a higher position (133, 149-150, 152). There were various other circumstances indicating that both men were guilty of abusing their sick leave privileges (135, 143, 153, 154-155, 158).

As summarized by the Court of Appeals in its opinion (166), "the evidence produced at this hearing was such that . . . anyone called upon to hear and weigh the testimony and circumstances could properly conclude and find therefrom that plaintiff had not been honest in this claim of illness and had been guilty of abusing his sick-leave privileges."

At the conclusion of the hearing the hearing officer stated that it was his decision that there had been a severe case of abuse of sick leave privilege and that the two men would be discharged. However, in order not to prejudice their securing other employment he offered them an opportunity to resign if they so desired (159). Both respondent and DeMattia handed in written resignations (Ex. 2, 29-30, 89), respondent indicating that he was doing so reluctantly and "under protest" (98, 138).

The contract provided that if the initial decision of the hearing officer was unsatisfactory an appeal could be taken to the chief operating officer of petitioner (Ex. A, Art. XI (b) (5)(10), 66-68).

Both men were specifically advised that notwithstanding their resignations they could appeal under the collective bargaining agreement to petitioner's chief operating officer (99, 159-160). Despite the fact that this specific contract provision was called to his attention, respondent failed to appeal (99).

At the trial petitioner argued that because of respondent's failure to appeal to petitioner's chief operating officer respondent could not present a justiciable controversy in a Missouri forum. The District Court allowed the case to go to the jury and a verdict in favor of respondent in the amount of $7,500 was returned on March 10, 1951 (118). Thereafter, however, on motion of petitioner, the District Court on June 7, 1951, set aside the verdict and entered judgment dismissing the complaint (120-121).

The District Court held that the contract, being a Missouri contract (125), was to be interpreted according to the law of the State of Missouri and that the cases of *Reed* v. *St. Louis S. W. R. Co.*, 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 68 F. 2d 826, required that plaintiff, under the facts of this case, exhaust the remedies provided in his contract of employment to have his cause of discharge reviewed on appeal, as provided in the contract, before bringing an action on the contract for wrongful discharge (126).

In addition, because he believed he had erred under Missouri law in allowing the jury to consider mental anguish as an element of damages, the District Judge alternatively ruled that if, on appeal, it should be held that he erred in dismissing the complaint, there should nonetheless be a new trial unless plaintiff filed a remittitur of $6,200 (120-121, 129).

On July 7, 1951, respondent filed his notice of appeal in the District Court (130). The case was orally argued in the Court of Appeals on March 7, 1952 (163).

The Court of Appeals on October 6, 1952 (180) reversed the order of the District Court and remanded the cause for further proceedings with an opinion by Judge Johnsen, a concurring opinion by Judge Collet and a dissenting opinion by Judge Riddick (164-180). Judges Johnsen and Collet held that the case of *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, overruled the *Reed* and *Harrison* cases, *supra*, and held that the collective bargaining agreement was not one whose administrative-remedy provisions had their source in or were subject to appraisement on the basis of state law. The opinion stated (173):

> "So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained."

It concluded that Missouri would not be at liberty to hold that adjustment provisions of a contract made under and pursuant to the Railway Labor Act constituted conditions precedent to the right to sue for wrongful discharge.

In his dissenting opinion, Judge Riddick pointed out that state substantive law was alone controlling here, stating (178):

> "The District Court was correct in holding that the controlling substantive law was that of Missouri

concerning which there is no dispute. *Reed* v. *St. Louis, Southwestern R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.

"There is nothing in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, which requires or even suggests any other conclusion."

Although a majority of the Court of Appeals found that "the evidence legally required the holding that he [respondent] was discharged for dishonest abuse of the sick-leave privilege, and the contract had left that ground, under proper motive, as a sufficient legal basis for the action which the employer [petitioner] took" (167), the Court went on to hold that respondent was entitled to have a jury pass on the question of whether or not he waived the notice requirements of the union contract (167-170) even though respondent admitted that he had no doubt whatever about the charge against him (144), voluntarily attended the hearing on the date agreed upon, heard the written notice read at the commencement of the hearing and stated he was ready to proceed (136, 152, 154). The Court of Appeals accordingly remanded the case for further proceedings.

Specification of Errors to Be Urged

The Court of Appeals erred:

(1) In holding that the Railway Labor Act precluded the District Court from applying state law, otherwise controlling, governing the right to bring the action;

(2) In holding that the decision of this Court in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, overruled the cases of *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826;

(3) In failing to follow applicable local law that on the facts shown in the record respondent waived further notice of the hearing as a matter of law, and;

(4) In reversing the order of the District Court dismissing the complaint.

Reasons for Granting the Writ

1. The decision of the Court of Appeals in this case introduces confusion and uncertainty into an important field of labor cases where heretofore state substantive law has controlled. Basic questions directly affecting the nature and effect of collective bargaining agreements of every carrier subject to the Railway Labor Act are involved.

The basic questions here presented are bound to arise frequently in the field of industrial relations under the Railway Labor Act and it is in the public interest that this Court finally resolve these questions.*

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* Cf. *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434; *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826; *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887; *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593; *Texas & N. O. R. Co.* v. *McCombs*, 143 Tex. 257, 183 S. W. 2d 716; *Sinclair Prairie Oil Co.* v. *Dose*, 189 Okla. 569, 118 P. 2d 219; *Wallace* v. *Southern Pac. Co.*, 106 F. Supp. 742, 745 (N. D. Calif.);

2. In Missouri a contract of employment which requires an employee to attempt to adjust his dispute with his employer before he may seek redress in the courts is valid and enforceable. *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826. The Court of Appeals below would limit the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and specifically overrule Missouri law heretofore controlling.

To reach such a conclusion the Court of Appeals misapplied and misconstrued the decisions of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239. In refusing to apply state law in this instance, the Court of Appeals below fell into the same error which led this Court to reverse the Circuit Court of Appeals for the Fifth Circuit in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. It is respectfully submitted that the dissenting opinion of Judge Riddick below correctly states the applicable law (178):

Davis v. *Union Pacific R. Co.*, 21 CCH Labor Cases ¶66,834 (D. Neb.); *Roberts* v. *Thompson*, 107 F. Supp. 775 (E. D. Ark.).

An identical question of law is currently pending in the case of *Ringle* v. *Transcontinental & Western Air, Inc.*, docketed as Civil Case No. 6490 in the United States District Court for the Western District of Missouri, Western Division. On oral motion by counsel for the plaintiff therein (who is also counsel for respondent in this case) requesting postponement of the trial in the *Ringle* case, District Judge Duncan granted the motion stating that, since he concurred in the views of District Judge Ridge in dismissing the complaint in the case at bar, he would not proceed to trial in the *Ringle* case pending final disposition of the instant case on appeal.

"The District Court was correct in holding that the controlling substantive law was that of Missouri concerning which there is no dispute. *Reed* v. *St. Louis, Southwestern R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.

"There is nothing in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, which requires or even suggests any other conclusion."

A substantial amount of litigation has arisen, and perforce will arise, in state and federal courts in this field under the Railway Labor Act where federal jurisdiction depends solely on diversity of citizenship.* "Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation."** So sweeping an overruling of state law and the limiting and misapplication of the decisions of this Court in this important labor field merit a review by this Court of the ruling of the Court of Appeals below.

3. In view of the importance in the field of labor relations of decisions of the courts involving compliance or non-compliance with steps in collective bargaining grievance procedure, the decision of the Court of Appeals in refusing to apply local law on the subject of adequacy of notice of hearing under the grievance procedure and the waiver by the aggrieved employee of further notice should also be reviewed.

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* See cases cited in footnote p. 9, *supra*.

** Dissenting opinion of Mr. Justice Frankfurter in the case of *Johnson* v. *The New York, New Haven and Hartford Railroad Co.* (U. S. Supreme Court, November 17, 1952), 73 S. Ct. 125, 129.

ARGUMENT

1. The result reached below is contrary to the decision of this Court in the *Moore* case.

By the Act of April 10, 1936, 49 Stat. 1189, Title II was added to the Railway Labor Act, 45 U. S. C. §§181 *et seq.*, thus bringing within the purview of that Act, except as to Section 3 of Title I, "every common carrier by air engaged in interstate or foreign commerce, . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

Title II specifically provides in Section 204:*

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, *shall* be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes."

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* 45 U. S. C. §184.

Under this provision of the Railway Labor Act petitioner contracted with the duly authorized representatives of its employees establishing a procedure for the adjustment of disputes of the nature of this controversy which provided for an appeal to the chief operating officer of the carrier. Respondent did not see fit to take this appeal (99). He brought his action in the District Court on the ground of diversity of citizenship. He stipulated that the contract was a Missouri contract (125). To prevail in Missouri in an action for alleged breach of such a contract, respondent had to show that he had brought himself within its terms and had been unable to secure a satisfactory adjustment by the means therein expressly provided. *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, 889; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826, 827.

Since respondent did not attempt to adjust his dispute by appealing to petitioner's chief operating officer, it was clear that under controlling Missouri law respondent could not maintain this action.

The extract from Section 204, quoted above, contains the only pertinent provisions governing the adjustment of disputes between air carriers and their employees. If the language employed by Congress is at all pertinent it would appear to invite, not merely permit, the Missouri rule. By no conceit can it be said to preclude such a result.

In 1941 this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 634, held that the Railway Labor Act did not purport "to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a

suit in court" where no such requirement existed under applicable local law.*

In holding in 1950 that courts had no jurisdiction to invade the exclusive province of the National Railroad Adjustment Board to adjudicate a jurisdictional dispute involving a railroad and two employee accredited bargaining agents this Court explained its decision in the Moore case as follows:**

> "Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

Thus the effect of the *Moore* and *Slocum* cases is to establish merely that the Railway Labor Act does not oust state and federal courts of jurisdiction to adjudicate a

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* Mississippi law, governing in that case, imposed no such requirement. *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593.

** *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244.

common-law or statutory action for wrongful discharge. What law is to apply in such an action? As set out below, this Court in the *Moore* case made it plain that the law of the state forum involved was to apply.

Moore began his case in the Mississippi state courts. A demurrer to the complaint on the ground that his *contract* required him to adjust his dispute was overruled on November 8, 1937 by the Mississippi Supreme Court, 180 Miss. 276, 176 So. 593. The Mississippi Supreme Court in refusing to enforce the contract relied on rulings in fraternal benefit society cases,* overlooking the more apposite rulings of the Alabama Supreme Court on January 18, 1934 in *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434, and *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441. After proceedings in the state court involving the question of the applicability of the statute of limitations in Mississippi, Moore amended his bill for damages in excess of $3,000 and the railroad removed the case to the Federal court. The case came to this Court on certiorari to review a judgment of the Circuit Court of Appeals which applied the Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case. In its opinion this Court noted, however, that the railroad company had advanced another reason why a judgment in its favor should be sustained in that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely

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* *Independent Order of Sons & Daughters of Jacob* v. *Wilkes*, 98 Miss. 479, 53 So. 493; *Eminent Household of Columbia Woodmen* v. *Ramsey*, 118 Miss. 454, 79 So. 351; *Eminent Household of Columbian Woodmen* v. *Payne*, 18 Ala. App. 23, 88 So. 454.

brought because of his failure to exhaust the administrative remedies granted to him by the Railway Labor Act. The highest state court had already determined that under Mississippi law a contract requirement to this effect was not a prerequisite to bringing such a suit in a Mississippi court.

The respondent railroad in the *Moore* case unsuccessfully tried to persuade this Court that under the Railway Labor Act it was Moore's duty to exhaust the remedy under the agreement. In its opinion this Court said, 312 U. S. 630, 634: "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

It is clear that the sole basis for decision on this point in the *Moore* case was that

(1) the Railway Labor Act did not impose a requirement that an employee exhaust remedies provided in an agreement with a carrier subject to the Act, and

(2) Mississippi law was controlling under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, as to the necessity for exhausting contract remedies as a prerequisite to an action under the contract.

Merely because the local law of Mississippi happens to be different from the local law of Alabama and Missouri as to the necessity for exhausting such remedies does not affect the principle involved. The principle is that when an employee sees fit to sue for wrongful discharge under such a contract he divorces himself from any application of the Railway Labor Act and submits himself to an ad-

judication of his rights and remedies under the law of the forum. The obvious effect of the *Moore* and *Sloçum* decisions is to leave the state courts free to apply whatever local law is controlling in the adjudication of an action in the state court or under state law involving a wrongful discharge whether it be to require or not to require exhaustion of adjustment procedure under the contract.

In the *Moore* case the District Court had held:*

> "The decision of the Supreme Court of Mississippi was an announcement of the court of last resort in this state of the law pertaining to the contract sued upon, and under the Erie Railroad Company case is conclusive."

Far from grafting an exception to the doctrine of *Erie R. Co.* v. *Tompkins* in the field of contracts under the Railway Labor Act, this Court in the *Moore* case held that doctrine controlling in this field when it affirmed the judgment of the District Court based squarely on this premise. Under *Erie R. Co.* v. *Tompkins* the Court below was bound to follow Missouri law, and could have no possible basis for overruling *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, or *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.

In holding, as the Court of Appeals did in this case (173), that:

> "Missouri law applicable to employment relationships would be without application to relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act."

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* 24 F. Supp. 731, 733.

the court below has reached a result completely contrary to the decision of this Court in the *Moore* case and wholly at variance with the rationale of the *Moore* case. It has failed to apply local law as required by *Erie R. Co.* v. *Tompkins*, and this in the light of decisions by this Court clearly stating that the Railway Labor Act is without applicability and does not seek to interfere with application of state law in this field.

The result is obscure. Missouri law is said not to be applicable to relationships under the Railway Labor Act. The Act in Section 204 prescribes that disputes between an employee and a carrier by air, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. If, therefore, this case were a matter regulated by the Act, respondent would have been required to adjust a dispute under the procedure in the contract by handling it in the usual manner up to and including the chief operating officer of the carrier, reaching the same result as under Missouri law. The result below is inconsistent with the general intent of Congress, as manifested by the Act. In *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, this Court said at pages 724-725: "To induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes," emphasizing this view in footnotes 12, 18, 26 and 27. In particular footnote 18 states ". . . The obligation is not partial. In plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or

minor." Similarly, footnote 26 emphasizes the Congressional direction that disputes shall be handled in the usual manner up to the chief operating officer of the carrier.

Judge Riddick in his dissenting opinion below thus ably summarizes the correct view of the *Moore* case (179-180):

> "Where either action [i. e., a proceeding before the Adjustment Board or an action at law for breach of contract] is available, the litigant has his choice. That is all the *Moore* case stands for. It certainly does not stand for the proposition that in an action for damages for breach of a Missouri contract, tried in a District Court in Missouri whose jurisdiction is based solely upon diversity of citizenship and the sum in controversy, the substantive law of Missouri is not controlling."

2. The Court of Appeals failed to apply local law on the subject of notice.

Since notice in any administrative hearing may be fundamental in determining the validity of the entire proceeding, its peculiar importance in this labor field cannot be gainsaid.

A requirement of notice assures that the flexibility so desirable in administrative hearings will not conflict with basic demands of fairness. But formality of notice is not an essential, as long as basic fairness is attained; there is no virtue in a ritualistic giving of notice. So it is the general law that one who has actual knowledge of an administrative hearing may not object to technical defects in notice. It is also the Missouri law. The decision of the Court of Appeals below is in irreconcilable conflict with

applicable local law. Again, since the conflict is basic, review by this Court is merited.

The Court of Appeals finds there was just cause, and no improper motivation, for respondent's "discharge" * (166-167, 177). Such discharge was preceded by a lengthy informal conference attended by respondent at which the charge against him was made clear beyond doubt (135, 144). At the same conference the date for holding the formal hearing was fixed for respondent's convenience (135). Respondent's collective bargaining agent admitted timely receipt of the notification letter (152). Respondent attended the hearing, stating he was ready to proceed after hearing the notification letter read aloud (136, 151, 152, 154). The Court of Appeals found no fault with this hearing, but held that notice of the hearing was not waived as a matter of law in view of respondent's subsequently claimed failure to receive a letter advising him, as he already knew, that the hearing which he attended was to be held.

If respondent did not waive notice as a matter of law when he admitted (1) he had no doubt whatever about the charge; (2) voluntarily appeared at a hearing at a date agreed upon with him for his convenience; (3) heard the written charge read and then stated he was ready to proceed, and (4) enjoyed every opportunity to present his case at a five-hour hearing, then it would appear impossible to waive notice as a matter of law.

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* Throughout this discussion it must be remembered that respondent resigned at the conclusion of the initial hearing (Ex. 2, 29-30, 89, 138).

The law of Missouri is clear that notice may be waived as a matter of law. *Butner* v. *Union Pac. R. Co.*, 236 Mo. App. 1134, 1142, 163 S. W. 2d 100, 104. The opinion of the Court of Appeals, which ignores the *Butner* case, is tantamount to a holding that notice of an administrative hearing may not be waived as a matter of law even where knowledge is admitted.

The decision of the Court of Appeals not only conflicts with applicable local law as set out in the *Butner* case; it conflicts with authorities generally. One who appears at an administrative hearing may not cavil at a lack of notification or at errors therein. *Merrill on Notice*, Sections 905, 906.

The confusion of law created by the decision of the Court of Appeals below on this point would have been obviated had it observed the Missouri rule that an employee must attempt to adjust his dispute with his employer as required by contract before he may burden Missouri courts with litigation. The appeal to petitioner's chief operating officer is a proceeding de novo at which respondent would, a second time with full notice, have every opportunity to present his case and obtain his employer's final decision within 10 days thereafter (Ex. A, Art. XI (b) (5), 66).

In effect, the Court of Appeals held that administrative adjustment provisions of a contract must be ignored,* ex-

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* "So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained" (173).

cept that the employer must not ignore them. And even though an employer has just cause for discharging an employee, the employee nonetheless has a cause of action should the employer deviate, however minutely, from the administrative adjustment provisions of the contract which the Court of Appeals says are otherwise to be ignored.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 18, 1952.

APPENDIX A

Railway Labor Act, Title II, P. L. 487, 74th Cong. 2d Sess., April 10, 1936, 49 Stat. 1189:

"TITLE II

"SECTION 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"SEC. 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 1 thereof.

"SEC. 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

"The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act.

"SEC. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional

boards of adjustment, under the authority of section 3, Title I, of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

"SEC. 205. When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this Act, to select and designate four representatives who shall constitute a board which shall be known as the 'National Air Transport Adjustment Board.' Two members of said National Air Transport Adjustment

Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by title I of this Act for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 3 of title I of this Act. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 3 of title I of this Act. The powers and duties prescribed and established by the provisions of section 3 of title I of this Act with reference to the National Railroad Adjustment Board and the several divisions thereof are hereby conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board

by the provisions of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

"SEC. 206. All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving any dispute arising from any cause between any common carrier by air engaged in interstate or foreign commerce or any carrier by air transporting mail for or under contract with the United States Government, and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board. The books, records, and papers of the National Labor Relations Board and of the National Labor Board pertinent to such case or cases, whether settled or unsettled, shall be transferred to the custody of the National Mediation Board.

"SEC. 207. If any provision of this title or application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

"SEC. 208. There is hereby authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this Act."

Approved, April 10, 1936.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 509

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

vs.

JOSEPH H. KOPPAL,

Respondent.

BRIEF FOR THE PETITIONER

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Specification of Errors to Be Urged	8
Summary of Argument	9
POINT I. Under the substantive law of Missouri respondent can show no breach of contract, having failed to exhaust the contract remedy of appeal to petitioner's chief operating officer	10
POINT II. The result reached by the Court of Appeals is contrary to the decision of this Court in the *Moore* case	15
POINT III. The Railway Labor Act does not preclude but rather invites the application of Missouri law which requires an appeal to the chief operating officer of a carrier as a condition precedent to a suit against the carrier for wrongful discharge	23
Conclusion	37
Appendix A	39
Appendix B	44
Appendix C	46

PAGE

Table of Cases Cited

Bell v. Faulkner, Mo. App., 75 S. W. 2d 612 ..... 10, 15

Bell v. Western Ry. Co., 228 Ala. 328, 153 So. 434 ..16, 31, 33

Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27 v. Toledo, Peoria & Western R., 321 U. S. 50 34

Craig v. Thompson, Mo. Sup., 244 S. W. 2d 37 22

Culver v. Kurn, 354 Mo. 1158, 193 S. W. 2d 602 ..10, 15, 27

Davis v. Union Pacific R. Co., D. Neb., 21 CCH Labor Cases ¶66,834 31

Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711 ....21, 26, 29

Eminent Household of Columbia Woodmen v. Ramsey, 118 Miss. 454, 79 So. 351 16

Eminent Household of Columbian Woodmen v. Payne, 18 Ala. App. 23, 88 So. 454 16

Erie R. Co. v. Tompkins, 304 U. S. 64 ..... 9, 16, 17, 18, 19, 21

Flickema v. Henry Kraker Co., 252 Mich. 406, 233 N. W. 362 33

Forsyth v. Board of Trustees of Park College, 240 Mo. App. 622, 212 S. W. 2d 82 ..... 10, 15

Gambrel v. United Mine Workers of America, Ky., 249 S. W. 2d 158 32

General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., 320 U. S. 323 34

General Committee of Adjustment v. Southern Pac. Co., 320 U. S. 338 34

PAGE

Harrison v. Pullman Co., 8 Cir., 68 F. 2d 826 ..... 6, 7, 8, 9, 12, 13, 15, 33

Illinois Central R. Co. v. Moore, 5 Cir., 112 F. 2d 959 ..... 17, 18, 22

Independent Order of Sons & Daughters of Jacob v. Wilkes, 98 Miss. 179, 53 So. 493 16

Keller v. Western Ry. Co., 228 Ala. 336, 153 So. 441 ..... 16, 31, 33

Louisville & N. R. Co. v. Bryant, 263 Ky. 578, 92 S. W. 2d 749 32

Louisville & N. R. Co. v. Wells, 289 Ky. 700, 160 S. W. 2d 16 32

Mitchell v. Stanolind Pipe Line Co., 10 Cir., 184 F. 2d 837 32

Moore v. Illinois Central R. Co., 311 U. S. 643 18

Moore v. Illinois Central R. Co., 312 U. S. 630 ..2, 7, 8, 9, 13, 14, 15, 18, 19, 20, 21, 22, 25, 31

Moore v. Illinois Cent. R. Co., 180 Miss. 276, 176 So. 593 ..... 16, 19, 22, 31, 33

Moore v. Illinois Central R. Co., S. D. Miss., 24 F. Supp. 731 16

Olsen v. Arabian American Oil Co., E. D. N. Y., 97 F. Supp. 801, aff'd, 194 F. 2d 477, cert. denied, 344 U. S. 817 36

Oswald v. Chicago, B & Q. R. Co., 8 Cir., 200 F. 2d 549 31

PAGE

Petty v. Missouri & Arkansas Ry. Co., 205 Ark. 990, 167 S. W. 2d 895, cert. denied, 320 U. S. 738, rehearing denied, 320 U. S. 812 ..... 28, 32

Price v. Davis, 187 Mo. App. 1[illegible]73 S. W. 64 33

Reed v. St. Louis S. W. R. Co., Mo. App., 95 S. W. 2d 887 ..... 6, 7, 8, 9, 11, 12, 13, 15, 33

Roberts v. Thompson, E. D. Ark., 107 F. Supp. 775 .. 28, 32

St. Louis, I. M. & S. Ry. Co. v. Mathews, 64 Ark. 398, 42 S. W. 902 ..... 28, 32

Schisler v. Perfection Milker Co., 193 Minn. 160, 258 N. W. 17 34

Sinclair Prairie Oil Co. v. Dose, 189 Okla. 569, 118 P. 2d 210 ..... 31, 33

Slocum v. Delaware L. & W. R. Co., 339 U. S. 239 ... 2, 19, 20

Squire v. Wright, 1 Mo. App. 172 33

Swart v. Huston, 154 Kan. 182, 117 P. 2d 576 32

Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548 ..... 26, 46

Texas & N. O. R. Co. v. McCombs, 143 Tex. 257, 183 S. W. 2d 716 ..... 31, 33

Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 ..... 27, 46

Wallace v. Southern Pac. Co., N. D. Cal., 106 F. Supp. 742 31

Wilson v. St. Louis-San Francisco Ry. Co., 362 Mo. 1168, 247 S. W. 2d 644 30

Statutes

	PAGE
Railway Labor Act, 44 Stat. 577, 45 U. S. C. §§151 *et seq.*	46
Sec. 3, 44 Stat. 578	44
Sec. 3 First (e), 44 Stat. 578	24, 25, 26
Title I, Sec. 3, 48 Stat. 1189, 45 U. S. C. §153	23
Sec. 3 First, 48 Stat. 1189, 45 U. S. C. §153 First	29
Sec. 3 First (i), 48 Stat. 1191, 45 U. S. C. §153 First (i)	24, 25, 26, 44, 45, 48
Sec. 3 First (l), 48 Stat. 1191, 45 U. S. C. §153 First (l)	29
Sec. 3 First (m), 48 Stat. 1191-2, 45 U. S. C. §153 First (m)	29
Sec. 3 Second, 48 Stat. 1193, 45 U. S. C. §153 Second	28
Title II, 49 Stat. 1189, 45 U. S. C. §§181 *et seq.*	2, 13, 23, 24, 34, 39-43, 44, 47
Title II, Sec. 204, 49 Stat. 1189, 45 U. S. C. §184	9, 21, 23, 24, 25, 26, 28, 29, 36
28 U. S. C. §1254(1)	1

Other Authorities

79 Cong. Rec. 10058-9	49
79 Cong. Rec. 10059	49
80 Cong. Rec. 5039	49
1 Corbin, Contracts §187	33
Hearings before the Senate Committee on Interstate Commerce on Sen. 2496, 74th Cong., 1st Sess. 11	48
H. R. Rep. No. 328, 69th Cong., 1st Sess. 3	34, 46
H. R. Rep. No. 2243, 79th Cong., 2d Sess. 3	49
Sen. 2496, 74th Cong., 1st Sess. §204	47
Sen. Rep. No. 895, 74th Cong., 1st Sess. 3	49

IN THE

Supreme Court of the United States

October Term, 1952

No. 509

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

vs.

JOSEPH H. KOPPAL,

Respondent.

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (124-130)* has not been reported. The opinion of the Court of Appeals reversing the judgment of the District Court (164-180) is reported in 199 F. 2d 117.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1). The judgment of the Court of Appeals was entered on October 6, 1952 (180). A petition for re-

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* Unless otherwise stated, references in parentheses are to pages of the record and italics are ours.

hearing filed on October 20, 1952 was denied on November 10, 1952 (181). Petition for a writ of certiorari was filed on December 18, 1952 and granted on February 9, 1953 (183). (97 L. ed. adv. p. 442).

Questions Presented

1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.
2. Whether the decisions of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, bar the application of state law requiring an employee to attempt to adjust his dispute with his employer before he may seek redress in state courts for alleged breach of a collective bargaining agreement made pursuant to the Railway Labor Act.

Statute Involved

The pertinent provisions of Title II, Railway Labor Act, 49 Stat. 1189, 45 U. S. C. §§181 *et seq.*, are printed in Appendix A *infra*, pp. 39-43.

Statement

Respondent Koppal brought action in the United States District Court for the Western District of Missouri, Western Division, based on diversity of citizenship, claiming that he had been wrongfully discharged contrary to the

terms of a collective bargaining agreement between petitioner and International Association of Machinists, a union representing the mechanics and related employees in the service of petitioner (1-18). Respondent was not a member of the union (2, 127). Petitioner as a carrier by air was subject to the Railway Labor Act and the contract was made pursuant to the Act so far as applicable (2, 19). It was stipulated by the parties that the contract was a Missouri contract (125).

Respondent in his complaint prayed for actual damages in the sum of $7,500 and for punitive damages in the sum of $15,000, averring that according to the union contract seniority, job and employment rights were vested in him of which he could not be deprived without just cause or reason. The union contract (Ex. A, 29-30, 31-88) did not prescribe what should constitute grounds for discharging an employee but respondent averred that he was wrongfully and unlawfully discharged for an alleged violation of the sick leave rule, that he was discharged without a fair hearing, was not notified in writing of the precise charge against him and that he was not given a reasonable opportunity to secure the presence of witnesses at a hearing prior to the time of his discharge (1-18).

Upon the trial in the District Court, the following facts were established:

Respondent and one DeMattia, a fellow worker, were suspended from employment by petitioner on November 9, 1949, on the charge of abuse of sick leave pay privilege under the union contract (135; Ex. 1, 29-30, 88-89; Ex. A, Art. XVII (j), 80).

Immediately following their suspension, respondent and DeMattia were orally notified (135, 159) that a hearing would be granted them pursuant to the provision of the union contract governing discharge (Ex. A, Art. XI (b) (10), 67-68), which provides that:

> "No employee who has been in the service of the Company ninety (90) days or more shall be discharged without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee."

The hearing was set for November 11, 1949, that date having been agreed upon with respondent (135). A letter was also written to respondent and the union grievance committee notifying them of the hearing (Ex. 1, 88-89). While the union stated that its copy was received on November 10 (152), respondent testified that he did not receive his copy until November 12 (97, 136), the day following the hearing. In any event respondent voluntarily attended the hearing on November 11, heard the written notice read and stated he was ready to proceed (97, 136, 151, 152, 154).

Evidence was presented at this hearing that respondent and DeMattia were both absent from work on November 8, 1949 (133, 140). Being shorthanded their foreman sent to see if they could report to work that afternoon (154), resulting in the discovery that respondent and DeMattia, who was discovered at respondent's home on the day of the alleged illness, had met by prearrangement to prepare for an examination for a higher position (133, 149-150, 152). There were various other circumstances indicating

that both men were guilty of abusing their sick leave privileges (135, 143, 153, 154-155, 158).

As summarized by the Court of Appeals in its opinion (166), "the evidence produced at this hearing was such that . . . anyone called upon to hear and weigh the testimony and circumstances could properly conclude and find therefrom that plaintiff had not been honest in this claim of illness and had been guilty of abusing his sick-leave privileges."

At the conclusion of the hearing the hearing officer stated that it was his decision that there had been a severe case of abuse of sick leave privilege and that the two men would be discharged. However, in order not to prejudice their securing other employment, he offered them an opportunity to resign if they so desired (159). Both respondent and DeMattia handed in written resignations (Ex. 2, 29-30, 89), respondent indicating that he was doing so reluctantly and "under protest" (98, 138).

The contract provided that if the initial decision of the hearing officer was unsatisfactory an appeal could be taken to the chief operating officer of petitioner (Ex. A, Art. XI (b) (5) (10), 66-68).

Both men were specifically advised that notwithstanding their resignations they could appeal under the collective bargaining agreement to petitioner's chief operating officer (99, 159-160). Despite the fact that this specific contract provision was called to his attention, respondent failed to appeal (99).

At the trial petitioner argued that because of respondent's failure to appeal to petitioner's chief operating officer

respondent could not present a justiciable controversy in a Missouri forum. The District Court allowed the case to go to the jury and a verdict in favor of respondent in the amount of $7,500 was returned on March 10, 1951 (118). Thereafter, however, on motion of petitioner, the District Court on June 7, 1951 set aside the verdict and entered judgment dismissing the complaint (120-121).

The District Court held that the contract, being a Missouri contract (125), was to be interpreted according to the law of the State of Missouri and that the cases of *Reed* v. *St. Louis S.W. R. Co.*, 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 68 F. 2d 826, required that plaintiff, under the facts of this case, exhaust the remedies provided in his contract of employment to have his cause of discharge reviewed on appeal, as provided in the contract, before bringing an action on the contract for wrongful discharge (126).

In addition, because he believed he had erred under Missouri law in allowing the jury to consider mental anguish as an element of damages, the District Judge alternatively ruled that if, on appeal, it should be held that he erred in dismissing the complaint, there should nonetheless be a new trial unless plaintiff filed a remittitur of $6,200 (120-121, 129).

On July 7, 1951, respondent filed his notice of appeal in the District Court (130). The case was orally argued in the Court of Appeals on March 7, 1952 (163).

The Court of Appeals on October 6, 1952 (180) reversed the order of the District Court and remanded the cause for further proceedings with an opinion by Judge Johnsen, a concurring opinion by Judge Collet and a dissenting opinion

by Judge Riddick (164-180). Judges Johnsen and Collet held that the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, overruled the *Reed* and *Harrison* cases, *supra*, and held that the collective bargaining agreement was not one whose administrative-remedy provisions had their source in or were subject to appraisement on the basis of state law. The opinion stated (173):

> "So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained."

It concluded that Missouri would not be at liberty to hold that adjustment provisions of a contract made under and pursuant to the Railway Labor Act constituted conditions precedent to the right to sue for wrongful discharge.

In his dissenting opinion, Judge Riddick pointed out that state substantive law was alone controlling here, stating (178):

> "The District Court was correct in holding that the controlling substantive law was that of Missouri concerning which there is no dispute. *Reed* v. *St. Louis, Southwestern R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.
>
> "There is nothing in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, which requires or even suggests any other conclusion."

Although a majority of the Court of Appeals found that "the evidence legally required the holding that he [respondent] was discharged for dishonest abuse of the sick-leave privilege, and the contract had left that ground, under proper motive, as a sufficient legal basis for the action which the employer [petitioner] took" (167), the Court went on to hold that respondent was entitled to have a jury pass on the question of whether or not he waived the notice requirements of the union contract (167-170) even though respondent admitted that he had no doubt whatever about the charge against him (144), voluntarily attended the hearing on the date agreed upon, heard the written notice read at the commencement of the hearing and stated he was ready to proceed (136, 152, 154). The Court of Appeals accordingly remanded the case for further proceedings.

Specification of Errors to Be Urged

The Court of Appeals erred:

(1) In holding that the Railway Labor Act precluded the District Court from applying state law, otherwise controlling, governing the right to bring the action;

(2) In holding that the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, overruled the cases of *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826, and;

(3) In reversing the order of the District Court dismissing the complaint.

Summary of Argument

Under the substantive law of Missouri an employee, before bringing an action for wrongful discharge under a contract of employment, must attempt to adjust his dispute with his employer in accordance with any remedial provisions of the contract of employment. Since respondent failed to appeal to the chief operating officer of petitioner in accordance with the grievance procedure of the collective bargaining agreement upon which he sought to predicate his action, he cannot present a justiciable controversy under the law of Missouri. *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826.

This Court in its decisions in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, has made it plain that state substantive law controls in this action for damages for breach of a Missouri contract, tried in a District Court in Missouri whose jurisdiction is based solely on diversity of citizenship and the sum in controversy.

The Railway Labor Act does not preclude the application of the Missouri rule to the case at bar. Moreover, the Missouri rule would be entirely consistent with the Railway Labor Act, which provides "The disputes between an employee . . . and a carrier or carriers by air . . . *shall* be handled in the usual manner *up to and including* the chief operating officer of the carrier . . ."*

The Missouri rule promotes industrial peace and reduces litigation by providing a speedy and inexpensive

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* 49 Stat. 1189, Sec. 204, 45 U. S. C. § 184.

channel to dispose of grievances by peaceful adjustment in entire conformity with the Railway Labor Act. The District Court correctly ruled that Missouri substantive law was controlling in this action and it was error for the Court of Appeals to reverse the ruling of the District Court dismissing respondent's complaint.

POINT I

Under the substantive law of Missouri respondent can show no breach of contract, having failed to exhaust the contract remedy of appeal to petitioner's chief operating officer.

In Missouri, employment without definite term is terminable by either party at will. *Culver* v. *Kurn*, 354 Mo. 1158, 193 S. W. 2d 602; *Forsyth* v. *Board of Trustees of Park College*, 240 Mo. App. 622, 212 S. W. 2d 82; *Bell* v. *Faulkner*, Mo. App., 75 S. W. 2d 612. Accordingly, respondent was compelled to turn to the collective bargaining agreement (Ex. A, 29-30, 31-88), in order to show any tenure of employment whatsoever. In this respect Article XI (b) (10) of the agreement provides (67-68):

> "No employee who has been in the service of the Company ninety (90) days or more shall be discharged without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee. Suspension from the service of the Company pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised, in writing, of

the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. If a stenographic report of the investigation is taken, the Union Committee or representative will be furnished a copy. A written decision will be issued within five (5) work days after the close of such hearing. If the decision is not satisfactory, then appeal may be made in accordance with the procedure prescribed in Step 3."

The "procedure prescribed in Step 3" referred to in Section 10 is that found in Article XI (b) (5) (66):

> "If the decision in Step 2 or 2B is not satisfactory, then appeal may be made by the System General Chairman to the Chief Operating Officer of the Company or his authorized representative. Notice of intent to appeal will be in writing and must be made within ten (10) work days after the decision in Step 2 or 2B, and the actual appeal must be perfected and submitted within thirty (30) days from date of original notice. The decision in Step 3 must be given within ten (10) work days after presentation of the grievance in the third step."

Under Missouri law, where a contract is entered into between an employer and the union representing the employees for the purpose of establishing a complete and explicit code for the adjustment of labor disputes, to prevail in a suit based upon an alleged breach of such a contract the employee must show that he has brought himself within its terms and has been unable to secure a satisfactory adjustment by the means therein expressly provided. Where he fails to do this he is unable to present his case in court as a justiciable controversy. *Reed* v. *St. Louis S. W. R.*

Co., Mo. App., 95 S. W. 2d 887, 889; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826, 827. This rule is succinctly stated at page 889 of the opinion in the *Reed* case as follows:

> "But concededly no appeal was taken by respondent, and thus having failed to exhaust the remedies provided for in the contract in the manner relating to his discharge, plaintiff cannot present his case in court as a justiciable controversy."

In the case at bar at the conclusion of the initial hearing, respondent handed in his written resignation (Ex. 2, 29-30, 89). He was advised that notwithstanding his resignation he could appeal under the collective bargaining agreement to petitioner's chief operating officer (99, 159-160). Despite the fact that this specific contract provision was called to his attention, respondent failed to appeal (99).

Because he failed to attempt to secure the peaceful adjustment of his dispute within the framework of his collective bargaining agreement, the District Judge held that respondent could not present his case as a justiciable controversy, saying that the cases of *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887, 889, and *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826, 827, "require plaintiff, under the facts of this case, to exhaust the remedies provided in his contract of employment, to have his cause of discharge reviewed on appeal as therein provided, before bringing an action on the contract for wrongful discharge" (126). As further pointed out by the District Judge (128), ". . . the breach of contract does not occur at the conclusion of the first hearing, but could only occur after

he has exhausted all of his remedies to have the cause of his discharge reviewed as provided in the contract."

The District Judge recognized (124-126) that the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, did not overrule Missouri substantive law as set forth in the *Reed* and *Harrison* cases, *supra*.

The Court of Appeals, Judge Riddick dissenting, noted that under Missouri law the substantive right of recovering damages for wrongful discharge is not enforceable so long as there exist administrative remedies under the contract which have not been exhausted, but reversed on the ground that:

> "The collective bargaining agreement, however, was not one whose administrative-remedy provisions had their source in or were subject to appraisement on the basis of state law" (171-172).

It based this conclusion on the fact that:

> "The contract was one made under and pursuant to the prescriptions of the Railway Labor Act, Title II, 45 U. S. C. A. §§181 et seq. Recitation of that fact is made in its preamble and its body contains a specific provision that 'Nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded either to the employees or to the Company or to their duly accredited representatives, under the provisions of the Railway Labor Act'" (172).

It also noted that the administrative-remedy provisions of the agreement conform to the requirements of the Act. Upon this basis the Court decided that:

> "The nature and effect of the provisions for the administrative adjustment of disputes contained in the contract are therefore questions relating to the Railway Labor Act and not to Missouri Law" (172).

The majority was under the impression that the nature and effect of such provisions in a contract made under the Railway Labor Act had been settled by this Court in *Moore* v. *Illinois Central R. Co.*, irrespective of state law (172). The Court below misconstrued the decision of this Court in the *Moore* case as obviating the need for resort to these adjustment provisions as a prerequisite to suit in any state court. As a result the Court concluded:

> ". . . Missouri would not, of course, be at liberty to hold contrarily that the adjustment provisions of a contract made under and pursuant to the Railway Labor Act were compulsory in nature and constituted conditions precedent to the right to sue for wrongful discharge in an employment relationship covered by the Act: Missouri law applicable to employment relationships would be without application to relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act. So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained" (173).

The inconsistency in this is that although, according to the Court below, the contract would have to be treated by the Missouri Courts "for justiciable purposes in their

forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained" (173), in Missouri without these administrative adjustment provisions in the contract, the employment would be terminable at will, and no action for wrongful discharge could lie. *Culver* v. *Kurn*, 354 Mo. 1158, 193 S. W. 2d 602; *Forsyth* v. *Board of Trustees of Park College*, 240 Mo. App. 622, 212 S. W. 2d 82; *Bell* v. *Faulkner*, Mo. App., 75 S. W. 2d 612. It is upon the language of these provisions that an employee will not be discharged "without a fair hearing" that respondent predicated his action. If the Court of Appeals deletes the administrative adjustment provisions, for justiciable purposes in a Missouri forum, it also destroys respondent's case.

As shown in Point II *infra*, however, this Court in the *Moore* case did not overrule the *Reed* and *Harrison* cases nor make them inapplicable in disposing of this controversy.

POINT II

The result reached by the Court of Appeals is contrary to the decision of this Court in the *Moore* case.

The action which came before this Court in 1941 in the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, was originally commenced in the Mississippi state courts. In his declaration in the state court Moore alleged that he was arbitrarily discharged by the defendant railroad on February 15, 1933, and he sought damages in the sum of $3,000.

A demurrer to the complaint on the ground that his *contract* required him to adjust his dispute was overruled

on November 8, 1937 by the Mississippi Supreme Court, 180 Miss. 276, 176 So. 593. The Mississippi Supreme Court in refusing to enforce the contract relied on rulings in fraternal benefit society cases,* overlooking the more apposite rulings of the Alabama Supreme Court on January 18, 1934 in *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434, and *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441. The Mississippi Supreme Court also ruled that Moore's suit was not on an oral contract (barred by the Mississippi three-year statute of limitations), but on a written contract made with the railroad for his benefit by the Brotherhood of Railroad Trainmen; hence, timely as commenced within the period of the Mississippi six-year statute of limitations applicable to written contracts.

After the decision by the Mississippi Supreme Court, Moore amended his declaration for damages in excess of $3,000 and the railroad removed the case to the Federal Court. The railroad renewed the pleas made in the state court, contending that the Federal Court had power to determine for itself the sufficiency of these pleas, while Moore contended that the decision of the state court was *res judicata*. Believing that it was bound to apply state substantive law in view of the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the District Court said, 24 F. Supp. 731, 733:

> ". . . It is not necessary to determine whether the effect of the ruling is res adjudicata or the law of the case in view of the holding of the Supreme Court

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* *Independent Order of Sons & Daughters of Jacob* v. *Wilkes*, 98 Miss. 179, 53 So. 493; *Eminent Household of Columbia Woodmen* v. *Ramsey*, 118 Miss. 454, 79 So. 351; *Eminent Household of Columbian Woodmen* v. *Payne*, 18 Ala. App. 23, 88 So. 454.

> of the United States in the recent case of Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. The decision of the Supreme Court of Mississippi was an announcement of the court of last resort in this state of the law pertaining to the contract sued upon, and under the Erie Railroad Company Case is conclusive."

Moore recovered a judgment. On appeal, the Circuit Court of Appeals for the Fifth Circuit, Judge Holmes dissenting, held that the doctrine of *Erie* v. *Tompkins* applied only to local matters governed wholly by state law. It took the view that, 112 F. 2d 959, 963: "A railroad union contract applying over a railroad system which operates in many States is not such. Its meaning and effect ought to be the same in each State." It held, p. 964:

> "A collective agreement between the employees of an interstate carrier by rail and their employer is therefore not a local matter as to whose nature and application the decisions of a State Supreme Court are binding on the federal courts. On the contrary, because of the subject matter, and of the federal legislation touching it, a federal court is bound to exercise an independent judgment, and the Supreme Court of the United States has final authority. The decisions of the Supreme Court of Mississippi are entitled to the same respectful consideration as are those of the courts of other States, but no more."

It concluded that the requirement under the adjustment provisions of the collective agreement, that an appeal be taken to the highest operating officer, was not a prerequisite to a suit in court, determining this question as a matter of

Federal law. It reversed, however, on the ground that the action was barred by the three-year statute of limitations because it was not apparent that Moore's contract of employment was wholly provable in writing.

In dissenting in this case, Judge Holmes said, 112 F. 2d 959, 967:

> "Upon the facts before us, the federal court is not authorized to exercise an independent judgment, either as to the construction of the contract sued on or as to the applicable statute of limitations. Both are questions of state law, and we should follow the state court. The highest court of Mississippi has held that the action is not barred, and I think we are bound by its decision, since it does not appear that the state court has altered its opinion."

Following grant of certiorari, 311 U. S. 643, this Court reversed the judgment of the Circuit Court of Appeals for failure to follow *Erie R. Co.* v. *Tompkins* and affirmed the judgment of the District Court, saying, 312 U. S. 630, 634:

> "But even before the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts."

In the *Moore* case the respondent railroad contended that Moore was required by the Railway Labor Act itself to exhaust his remedy under the collective bargaining agreement for adjustment of his grievance as a prerequisite to resort to the courts. In its opinion this Court said, 312 U. S. 630, 634:

> "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

It seems clear that the sole basis for decision on this point in the *Moore* case was that the Act itself did not impose such a requirement. Mississippi law governing the case imposed no such requirement, *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593, and Mississippi law on this point was controlling under *Erie R. Co.* v. *Tompkins*. That this is the effect of the *Moore* case is made clear in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239. In holding in that case that courts had no jurisdiction to invade the exclusive province of the National Railroad Adjustment Board to adjudicate a jurisdictional dispute involving a railroad and two employee accredited bargaining agents, this Court explained its decision in the *Moore* case as follows, 339 U. S. 239, 244:

> "Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a col-

lective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

Thus the effect of the *Moore* and *Slocum* cases is to establish merely that the Railway Labor Act does not oust state and federal courts of jurisdiction to adjudicate a common-law or statutory action for wrongful discharge. What law is to apply in such an action? If the Act, itself, is not controlling as this Court made plain in the *Moore* case, then state law must apply.

Merely because the local law of Mississippi happens to be different from the local law of Alabama and Missouri as to the necessity for exhausting such remedies does not affect the principle involved. The principle is that when an employee sees fit to sue for wrongful discharge under such a contract he divorces himself from any application of the Railway Labor Act and submits himself to an adjudication of his rights and remedies under the law of the forum. The obvious effect of the *Moore* and *Slocum* decisions is to leave the state courts free to apply whatever local law is controlling in the adjudication of an action in the state court or under state law involving a wrongful discharge whether it be to require or not to require exhaustion of adjustment procedure under the contract.

In holding, as the Court of Appeals did in this case (173), that:

> "Missouri law applicable to employment relationships would be without application to relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act"

the court below has reached a result opposite to that of the *Moore* case. It makes the Railway Labor Act controlling on a subject which this Court left to decision under local law as required by *Erie R. Co.* v. *Tompkins*.

The result is obscure. Although Missouri law is said not to be applicable to relationships under the Railway Labor Act, the Act itself is not made applicable to this dispute. The Act in Section 204 prescribes that disputes between an employee and a carrier by air, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. If, therefore, this dispute were regulated by the Act, respondent would have been required to adjust the dispute under the procedure in the contract by handling it in the usual manner up to and including the chief operating officer of the carrier, reaching the same result as under Missouri law. In *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, this Court said at pages 724-725: "To induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes," emphasizing this view in footnotes 12, 18, 26 and 27. In particular footnote 18 states " . . . The obligation is not partial. In plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or minor." Similarly footnote 26 emphasizes the Congressional direction that disputes "*shall be handled in the usual manner up to and including* the chief operating officer of the carrier . . ." [Emphasis by the Court]

It is submitted that Judge Riddick in his dissenting opinion below correctly summarizes the effect of the *Moore* case (179-180):

> "Where either action [i.e., a proceeding before the Adjustment Board or an action at law for breach of contract] is available, the litigant has his choice. That is all the *Moore* case stands for. It certainly does not stand for the proposition that in an action for damages for breach of a Missouri contract, tried in a District Court in Missouri whose jurisdiction is based solely upon diversity of citizenship and the sum in controversy, the substantive law of Missouri is not controlling."

The view of Judge Riddick as to the holding of this Court in the *Moore* case is shared by the Supreme Court of Missouri, for in the case of *Craig* v. *Thompson*, Mo. Sup., 244 S. W. 2d 37, 44, Judge Conkling, speaking for that Court, said that the *Moore* case:

> ". . . merely reversed the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in a case, 112 F. 2d 959, wherein the latter court had refused to follow the ruling of the Mississippi Supreme Court in the latter court's ruling, 180 Miss. 276, 176 So. 593, construing a Mississippi Statute of Limitations."

POINT III

The Railway Labor Act does not preclude but rather invites the application of Missouri law which requires an appeal to the chief operating officer of a carrier as a condition precedent to a suit against the carrier for wrongful discharge.

By the Act of April 10, 1936, 49 Stat. 1189, Title II was added to the Railway Labor Act, 45 U. S. C. §§ 181 *et seq.*, thus bringing within the purview of that Act, except as to Section 3 of Title I, "every common carrier by air engaged in interstate or foreign commerce, . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

Title II specifically provides in Section 204:*

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, *shall* be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes."

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*45 U. S. C. § 184.

The extract from Section 204, quoted above, contains the only pertinent provisions governing the adjustment of disputes between air carriers and their employees. If the language employed by Congress is at all pertinent it would appear to invite, not merely permit the Missouri rule, and could not be said to preclude it.

In Section 3(c) of the original 1926 Act, 44 Stat. 578 (Appendix B *infra*, p. 44), Congress employed the mandatory "shall," both in prescribing (1) the duty of employers and employees subject to the Act to handle disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions up to and including the chief operating officer of the carrier designated to handle such disputes and (2) the further duty, in event of failure to reach adjustment in such manner, to refer the dispute to the designated adjustment board.

In the 1934 amendment, 48 Stat. 1185 (Appendix B *infra*, p. 45), the mandatory "shall" was retained with respect to the duty to handle disputes up to and including the chief operating officer of the carrier, while the permissive "may" was employed with respect to the further reference of disputes remaining unadjusted in such manner to the appropriate division of the National Railroad Adjustment Board.

In adding Title II to the Railway Labor Act by the 1936 amendment, 49 Stat. 1189 (Appendix A *infra*, pp. 39-43), again the mandatory "shall" was employed with respect to the duty to handle disputes up to and including the chief operating officer of the carrier and the permissive "may" was employed with respect to the further reference of un-

adjusted disputes to the appropriate adjustment board established under Section 204 of Title II.

In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 635, this Court deemed it significant that Section 153 First (i), "as amended in 1934, provides no more than that disputes 'may be referred . . . to the . . . Adjustment Board . . .,'" pointing out that it was "significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . .'."

The legislative history of the 1934 amendment gives no express answer as to why Congress changed the second "shall" in Section 153 First (i) to "may," while retaining the first "shall" in that section. It is not unreasonable to assume, however, that Congress recognized that in providing for the establishment of the National Railroad Adjustment Board in the place of the former system boards of adjustment, an election of remedies would exist when the case was referred under proper authorization to the National Railroad Board of Adjustment. This was precisely the effect of the 1934 amendment because Congress then, for the first time, made provision in Section 153 First (l) for the breaking of a deadlock by the mandatory appointment of a neutral "referee."

If the change of the second "shall" to "may" was a studied change, the retention of the first "shall" in both the 1934 amendment to Section 153 First (i) and the 1936 amendment adding Section 204 under Title II was equally studied, for the entire legislative history of the Railway

Labor Act makes it clear that Congress meant to encourage and require the peaceful adjustment of "all disputes covered by the Act, whether major or minor."*

Neither the plain words repeatedly employed by Congress in the original 1926 Act and the 1934 and 1936 amendments prescribing that disputes *shall* be handled *up to and including* the chief operating officer of the carrier, nor the legislative history of the original Act and its successive amendments (see Appendix C *infra*, pp. 46-50), can be reconciled with the view that the Act itself would preclude the application of the Missouri rule to the case at bar.

This Court has repeatedly examined the legislative history of the Railway Labor Act and the Congressional purpose to prevent interruption of service in interstate commerce by making full and complete negotiations to settle promptly all disputes obligatory on employer and employees alike. Never has this Court intimated that Congress intended to invalidate state substantive law requiring such attempted adjustment contemplated by contract as a condition precedent to a suit for unlawful discharge in a state forum. In *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 567-568, this Court said:

> "It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures

* *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 725 n. 18.

[i.e., interference with the freedom of employees to designate representatives]."

Mr. Chief Justice Hughes in delivering the unanimous opinion of the Court in this case went on to say, at page 571:

> "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing."

The foregoing views of Mr. Chief Justice Hughes were reaffirmed by this Court in *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 559, where Mr. Justice Stone, again speaking for a unanimous Court, said:

> ". . . it seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process.
>
> ". . . The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, nor preclude it from entering into any contract with individual employees. They do not 'interfere with the normal exercise of the right of the carrier to select its employees or to discharge them.'"

Had petitioner made no contract with respondent here, under Missouri law respondent's employment would have been terminable at will by either party. *Culver* v. *Kurn,* 354 Mo. 1158, 193 S. W. 2d 602. Since Congress, as evidenced by the foregoing opinions of this Court, had no

intention to interfere with the normal exercise of the right of the carrier to select its employees or to discharge them, Congress clearly did not disturb long standing local law, under which employment under a collective bargaining agreement is still terminable at will.* How then can Congress be said to have invalidated the Missouri rule which requires the employee to appeal to the chief operating officer and fail to secure a satisfactory adjustment of his grievance before resort to the courts.

When Congress provided in Section 204 of Title II that disputes *shall* be handled in the usual manner *up to and including* the chief operating officer of the air carrier, clearly Congress invited the Missouri rule which enforces the contract the parties have made. That Congress never contemplated interfering with a state court's construction of such a contract even in the railroad field is expressly evidenced by the provision in Section 3 Second of the 1934 amendment, 48 Stat. 1193, 45 U. S. C. §153 Second, which provides "Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section . . ."

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*Petty v. *Missouri & Arkansas R. Co.*, 205 Ark. 990, 167 S. W. 2d 895, cert. denied, 320 U. S. 738, rehearing denied, 320 U. S. 812; *St. Louis, I. M. & S. R. Co.* v. *Mathews*, 64 Ark. 398, 42 S. W. 902; *Roberts* v. *Thompson*, 107 F. Supp. 775 (E. D. Ark.).

This is the first time this Court has had occasion to consider in detail Section 204 of Title II of the Railway Labor Act. It thus becomes pertinent to examine one significant difference between the National Railroad Adjustment Board established under Section 3 of the 1934 amendment* and the TWA System Board of Adjustment established under Article XII of the collective bargaining agreement (Ex. A, 68-73) in conformity with the provisions of Section 204 of Title II of the Railway Labor Act, 49 Stat. 1189, 45 U. S. C. § 184, Appendix A *infra*, pp. 39-43.

When a case is referred to the National Railroad Adjustment Board if a deadlock should arise between the employer-employee representatives, it is *required* that it be broken by the appointment of a neutral "referee" pursuant to Section 3 First (l) of the 1934 amendment, 48 Stat. 1191, 45 U. S. C. § 153 First (l). Furthermore, when a case is referred to the National Railroad Adjustment Board by proper authorization of the parties, an election of remedies clearly has been made and the decision of the National Railroad Adjustment Board becomes final and binding on the parties, as provided in Section 3 First (m); 48 Stat. 1191-2, 45 U. S. C. § 153 First (m). *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711.

Unlike the situation obtaining in the case of railroads, there is no counterpart of the National Railroad Adjustment Board for air carriers under Title II of the Railway Labor Act. Instead, under Section 204, while vesting a yet unexercised power in the National Mediation Board to establish in its discretion a National Air Transport Adjust-

*48 Stat. 1189, 1191, 45 U. S. C. § 153 First, Appendix B *infra*, p. 45.

ment Board, comparable to the National Railroad Adjustment Board, Congress has merely made provision for establishment of boards of adjustment by each air carrier and its employees, such as the one established by petitioner here under Article XII of the collective bargaining agreement (Ex. A, 68-73).

The TWA System Board of Adjustment so established consists of four members, two selected by the Company and two selected by the Union (69). In the event the parties are unable to secure peaceful adjustment of a grievance and a deadlock ensues, they agree to attempt to break the deadlock by endeavoring to select a neutral referee (71-72). There is no obligation to agree on such a referee however and, if the parties are unable to agree on a referee and fail to break the deadlock by peaceful adjustment of the dispute voluntary in nature, there has been no election of remedies as would have existed had the case been referred to the National Railroad Adjustment Board, with the result that in the event the parties are unable to agree upon a peaceful adjustment of the dispute before the TWA System Board of Adjustment, either party would thereafter be free to resort to the courts.

Clearly there is no election of remedies when the parties are seeking peaceful adjustment of the dispute by handling the case in the usual manner up to and including petitioner's chief operating officer. An election of remedies can only exist when the dispute is referred to a board of adjustment finally empowered to decide the controversy. This likewise is the ruling of the Missouri Supreme Court in its decision in the case of *Wilson v. St. Louis-San Francisco Ry. Co.*, 362 Mo. 1168, 247 S. W. 2d 644, where, after the case was handled up to the chief operating officer of

the carrier, an election of remedies was held not to have been made where the employee had not authorized the union to submit his case to the National Railroad Adjustment Board.

Thus not only the handling of cases up to petitioner's chief operating officer but also the subsequent reference of such cases by proper authorization of the parties to the TWA System Board of Adjustment is in entire conformity with the "consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."*

The Missouri rule requiring an appeal to the chief operating officer of the carrier is followed in Alabama and Oklahoma and a similar principle has been followed by federal district courts in California and Nebraska. *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434; *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441; *Sinclair Prairie Oil Co.* v. *Dose*, 189 Okla. 569, 118 P. 2d 210; *Wallace* v. *Southern Pac. Co.*, 106 F. Supp. 742, 745 (N. D. Calif.); *Davis* v. *Union Pacific R. Co.*, 21 CCH Labor Cases ¶66,834 (D. Neb.). Texas originally followed the Missouri rule, but misreading the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, reversed its prior holdings and in the case of *Texas & N. O. R. Co.* v. *McCombs*, 143 Tex. 257, 183 S. W. 2d 716, adopted the Mississippi rule established in *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593. Since its decision in the case at bar below, the United States Court of Appeals for the Eighth Circuit has followed its ruling below in the case of *Oswald* v. *Chicago, B. & Q. R. Co.* (C. A. 8th Dec. 31, 1952), 200 F. 2d 549.

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* *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 635-636.

Arkansas, Kansas and Kentucky apply still a different rule, holding that contracts such as the one at bar are unilateral, lacking in mutuality and unenforceable. *Petty* v. *Missouri & Arkansas R. Co.*, 205 Ark. 990, 167 S. W. 2d 895, cert. denied, 320 U. S. 738, rehearing denied, 320 U. S. 812; *St. Louis, I. M. & S. R. Co.* v. *Mathews*, 64 Ark. 398, 42 S. W. 902; *Roberts* v. *Thompson*, 107 F. Supp. 775 (E. D. Ark.); *Swart* v. *Huston*, 154 Kan. 182, 117 P. 2d 576; *Gambrel* v. *United Mine Workers of America*, 249 S. W. 2d 158 (Ky.); *Louisville & N. R. Co.* v. *Wells*, 289 Ky. 700, 160 S. W. 2d 16; *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749. Hence in these states likewise, though for a different reason, respondent could not maintain this action.

The present state of law in the various states may therefore be summarized as follows:

1. Arkansas, Kansas and Kentucky* refuse to regard a provision in a collective bargaining agreement that an employee shall not be discharged, except in accordance with the grievance adjustment provisions of the agreement, as affording any tenure of employment sufficient to ground an action for wrongful discharge, because there is no mutuality in the absence of any obligation on the part of the employee to serve for any term.

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* *Petty* v. *Missouri & Arkansas R. Co.*, 205 Ark. 990, 167 S. W. 2d 895, cert. denied, 320 U. S. 738, rehearing denied, 320 U. S. 812; *St. Louis, I. M. & S. R. Co.* v. *Mathews*, 64 Ark. 398, 42 S. W. 902; *Roberts* v. *Thompson*, 107 F. Supp. 775 (E. D. Ark.); *Swart* v. *Huston*, 154 Kan. 182, 117 P. 2d 576; *Mitchell* v. *Stanolind Pipe Line Co.*, 184 F. 2d 837 (C. A. 10th); *Gambrel* v. *United Mine Workers of America*, 249 S. W. 2d 158 (Ky.); *Louisville & N. R. Co.* v. *Wells*, 289 Ky. 700, 160 S. W. 2d 16; *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749.

2. Mississippi, and belatedly, Texas,* find in the adjustment provisions of the contract governing discharge a basis for an action for wrongful discharge but refuse to require the discharged employee to pursue his remedy under the adjustment provisions creating the cause of action as a condition precedent to suit in the courts.

3. Alabama, Missouri and Oklahoma** afford a cause of action to an individual employee under the adjustment provisions of the collective bargaining agreement for wrongful discharge, but hold that there has been no breach of contract and hence no justiciable controversy exists, until the employee has attempted to secure a peaceful adjustment of his dispute by appeal to the chief operating officer of the carrier and has not then received a fair hearing.

The Missouri rule last described finds support not only in the Congressional intent manifested in the Railway Labor Act, but also under ordinary common law concepts which (1) favor compromise to litigation*** and (2) require the plaintiff claiming damages for alleged breach of contract to minimize his loss.****

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* *Moore* v. *Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593; *Texas & N. O. R. Co.* v. *McCombs*, 143 Tex. 257, 183 S. W. 2d 716.

** *Bell* v. *Western Ry. Co.*, 228 Ala. 328, 153 So. 434; *Keller* v. *Western Ry. Co.*, 228 Ala. 336, 153 So. 441; *Harrison* v. *Pullman Co.*, 8 Cir., 68 F. 2d 826; *Reed* v. *St. Louis S. W. R. Co.*, Mo. App., 95 S. W. 2d 887; *Sinclair Prairie Oil Co.* v. *Dose*, 189 Okla. 569, 118 P. 2d 210.

*** ". . . compromises of disputed claims ought to be and in fact are favored and supported by the courts. Reduction of litigation by mutual agreement of litigants is much to the public interest; . . ." 1 Corbin, Contracts §187 (1951).

**** Cf. *Squire* v. *Wright*, 1 Mo. App. 172; *Price* v. *Davis*, 187 Mo. App. 1, 173 S. W. 61; *Flickema* v. *Henry Kraker Co.*, 252

One of the most important purposes of the grievance procedure, sought by the Union and Company alike, is to permit a full hearing of all disputes so that all the facts may be fairly presented and, if at all possible, an amicable adjustment reached. If this purpose is to be achieved it can only be had by the best efforts of both sides to the controversy. Since the encouragement of such efforts* appears to have been one of the primary aims of Congress in providing that disputes *shall* be handled *up to and including* the chief operating officer of the carrier, the Missouri rule is to be favored over the Mississippi rule which would jettison the entire grievance procedure established by the International Association of Machinists and petitioner in conformity with the requirements of the Railway Labor Act.

Congress has recognized that it is in the public interest that sound and harmonious industrial relations prevail in the railroad and airline industries. To achieve such industrial peace was one of the primary aims of the Railway Labor Act. That no small measure of success has

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Mich. 108, 233 N. W. 362; *Schisler* v. *Perfection Milker Co.*, 193 Minn. 160, 258 N. W. 17. This rule would be peculiarly apt in this case where "the evidence legally required the holding that he [respondent] was discharged for dishonest abuse of the sick-leave privilege, . . ." (167).

Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27 et al. v. *Toledo, Peoria & Western Railroad*, 321 U. S. 50, 58: "The policy of the Railway Labor Act was to encourage use of the non-judicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes." Cf. *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U. S. 338." See also H. R. Rep. No. 328, 69th Cong., 1st Sess. 3, numbered ¶5 (1926).

is evidenced by the fact that the National Mediation Board has not as yet found it necessary to establish a National Air Transport Adjustment Board and the fact that the instant occasion marks the first time since the passage of the 1936 amendment to the Act that petitioner's administration of the grievance procedure has been challenged in any court.

Certainly in this case there was no attempt whatever on the part of respondent to achieve a peaceful adjustment of his controversy. Not only did respondent make no effort to present the full facts at his initial hearing where he called no witnesses (154-155) and concealed the identity of one witness who was familiar with the facts on which the charge was based (143, 166, 176); he thereafter thwarted the entire purpose of the grievance procedure by failing to appeal his case to petitioner's chief operating officer (99), thus ending the case on the basis of his written resignation (Ex. 2, 30, 89; Ex. A, Article XI (b) (8), 67).

As the District Judge aptly held (128), there could be no breach of contract until respondent failed to receive fair treatment from petitioner's chief operating officer. Having failed to appeal (99), respondent is in no position to contend that the treatment he received was unfair.

Petitioner, as well as respondent, had a substantial interest to be served in having this controvery reviewed by petitioner's chief operating officer. Labor unrest resulting from the unsatisfactory handling of grievances can be disastrous and petitioner has an obvious self-interest in promoting sound industrial relations. In an air transport system that today operates domestically from Cali-

fornia to New York and thence overseas to Ceylon, harmonious industrial relations are promoted when petitioner's chief operating officer has the opportunity to review cases which cannot be peacefully adjusted in the initial stages of the grievance procedure.

Beyond this petitioner has a substantial investment in the cost of training skilled pilots to fly and expert mechanics to maintain the aircraft it operates. It cannot be presumed that petitioner's chief operating officer would lightly dissipate such investment by arbitrary action on review of any grievance. *Olsen* v. *Arabian American Oil Co.*, 97 F. Supp. 801, 803 (E. D. N. Y.), aff'd, 194 F. 2d 477, cert. denied, 344 U. S. 817.

By providing in Section 204 of Title II of the Act that "disputes between an employee . . and a carrier or carriers by air . . . *shall* be handled in the usual manner *up to and including* the chief operating officer of the carrier . . .," Congress clearly invited the Missouri rule and the order of the District Judge (120-121) dismissing respondent's complaint was correct.

CONCLUSION

The order of the Court of Appeals should be reversed and the order of the District Court dismissing respondent's complaint should be affirmed.

Respectfully submitted,

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Dated: March 13, 1953.

APPENDIX A

Railway Labor Act, Title II, P. L. 487, 74th Cong. 2d Sess., April 10, 1936, 49 Stat. 1189:

"TITLE II

"SECTION 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"SEC. 202. The duties, requirements, penalties benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were secifically included within the definition of 'carrier' and 'employee', respectively, in section 1 thereof.

"SEC. 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b). Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

"The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act.

"SEC. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional

boards of adjustment, under the authority of section 3, Title I, of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

"SEC. 205. When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this Act, to select and designate four representatives who shall constitute a board which shall be known as the 'National Air Transport Adjustment Board.' Two mem-

bers of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by title I of this Act for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 3 of title I of this Act. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 3 of title I of this Act. The powers and duties prescribed and established by the provisions of section 3 of title I of this Act with reference to the National Railroad Adjustment Board and the several divisions thereof are hereby conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board

by the provisions of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

"SEC. 206. All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving any dispute arising from any cause between any common carrier by air engaged in interstate or foreign commerce or any carrier by air transporting mail for or under contract with the United States Government, and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board. The books, records, and papers of the National Labor Relations Board and of the National Labor Board pertinent to such case or cases, whether settled or unsettled, shall be transferred to the custody of the National Mediation Board.

"SEC. 207. If any provision of this title or application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

"SEC. 208. There is hereby authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this Act."

Approved, April 10, 1936.

APPENDIX B

The pertinent provisions of §204 of Title II of the Railway Labor Act, 45 U.S.C. §184, are derived from the language of §3 First (i) of the Railway Labor Act of 1926, 45 U.S.C. §153 First (i), as amended.

The section as first passed read, 44 Stat. 578, 69th Cong., 1st Sess., c. 347, May 20, 1926:

> "SEC. 3. First. Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.
>
> The agreement—
>
> (a) Shall be in writing;
>
> (b) Shall state the group or groups of employees covered by such adjustment board;
>
> (c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute . . ."

This section was amended in 1934, to read as follows, 48 Stat. 1189, 1191, 73d Cong., 2 Sess., c. 691, June 21, 1934:

Appendix B

"'SEC. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

• • • •

"'(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

APPENDIX C

The legislative history of the Railway Labor Act, 44 Stat. 577, 45 U.S.C. §§151 *et seq.*, was referred to in *Texas & N.O.R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, and *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515.

The House Committee on Interstate and Foreign Commerce, in summarizing the bill which became the Railway Labor Act, said, H. R. Rep. No. 328, 69 Cong., 1st Sess. 3 (1926):

> "(4) Disputes between employers and employees are divided into three classes:
>
> "(a) Disputes over grievances or the interpretation or application of agreements.
>
> "(b) Disputes over proposed changes in agreements concerning rates of pay, rules or working conditions.
>
> "(c) All other disputes.
>
> "(5) All disputes must be considered first in conference, but if not settled in conference disputes in class *b* and *c* are considered directly by the Government board of mediation. Disputes in class *a* if not settled in conference must be referred to an adjustment board and are only considered by the board of mediation if not decided by the adjustment board:"

In 1934 at least five bills to amend the Railway Labor Act were introduced into the Seventy-Third Congress. Congress gave most of its attention to two of these, H.R. 9861 and S. 3266, which both contained the language of §3 which appeared in the amendment as enacted. The hearings, committee reports and debates in the Seventy-Third

Congress do not say anything significant about the substitution of "may" for "shall" in connection with the reference of disputes to the National Railroad Adjustment Board.

In 1936 Title II of the Railway Labor Act was enacted. 49 Stat. 1189, 45 U.S.C. §§181 *et seq.* As a bill it was S. 2496, 74th Cong., 1st Sess.

As originally introduced §204 of the bill was as follows:

> "SEC. 204. Nothing in this title shall be construed to prevent any individual carrier, system, or group of carriers by air, and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this title, from mutually agreeing to the establishment of system, group, or regional boards of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment under the authority of section 3 of title I of this act; or, pending the establishment of a permanent national board of adjustment as hereinafter provided, to prevent said carriers by air and any class or classes of their employees, all acting through their representatives, selected in accordance with the provisions of this title, from mutually agreeing to the establishment of a national board of adjustment of temporary duration and of similarly limited jurisdiction."

At the hearings on S. 2496 before the Senate Committee on Interstate Commerce, the National Mediation Board, through its Secretary, George A. Cook, suggested that this section be replaced with the language in the same section of a similar bill, H.R. 7268, 74th Cong., 1st Sess.

The language in H.R. 7268 repeated that of §3 First (i) of Title I of the Railway Labor Act, 45 U.S.C. §153 First (i), as amended in 1934. The Board submitted a statement, *Hearings before the Senate Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess.* 11 (1935):

> "Furthermore the bill in its present form would therefore depart from the plan devised in the Railway Labor Act for handling disputes among the employees of the railroads, wherein the line is drawn so that the Mediation Board will deal only with the representation cases and cases involving the larger questions of changes in rules and working conditions, leaving to the National Railroad Adjustment Boards the settlement of individual grievances arising from disputes involving the interpretation of contracts."

There occurred this colloquy with Mr. Cook, *Hearings* at 11-12:

> "Senator BLACK. Mr. Chairman, may I ask Mr. Cook a question.
>
> "Senator MINTON (chairman of the subcommittee). Certainly, Senator Black.
>
> "Senator BLACK. As to substituting for sections 203 and 204 what you suggest, might I ask if those substitutes are drawn in such a way as to give exactly the same range to the men engaged in air transport as would be invoked by men engaged in railroad employment.
>
> "Mr. COOK. I understand so.
>
> "Senator BLACK. The object is not to impair the effectiveness of the bill but simply to make it apply

with uniformity to both classes of employees, as I understand it.

"Mr. COOK. That is correct."

The Senate Committee on Interstate Commerce reported S. 2496 with the suggested amendment. Sen. Rep. No. 895, 74th Cong., 1st Sess. 3 (1935).

The Senate accepted the amendment with reference to §204. 79 Cong. Rec. 10058-10059 (1935).

Senator Minton gave this explanation of the bill on the Senate floor, 79 Cong. Rec. 10059:

"Mr. MINTON. Mr. President, in 1926 Congress enacted what is known as the 'Railway Labor Act.' The bill now before us merely provides for the extension of the Railway Labor Act provisions to air pilots and mechanics engaged in the air service in interstate commerce."

The House Committee on Interstate and Foreign Commerce reported the bill, as amended, and said, H.R. Rep. No. 2243, 79th Cong., 2d Sess. 3 (1936):

"This measure provides for a peaceful means of settlement of all disputes common to employers and employees that may result in disturbing the movement of the air mail. In short, this measure provides the same machinery for mediating disputes in the air transportation industry which is now so successfully in effect on the railroads."

Representative Crosser said this about the bill on the House floor, 80 Cong. Rec. 5039 (1936):

"I believe all must concede that the operation of the Railway Labor Act has preserved peace in the

railway industry more effectively than has ever before been possible. For that reason we believe that it is very desirable to bring the Air Pilots Association under the operation of the Railway Labor Act. That is all that this bill does; nothing more. It does not change the terms of the Railway Labor Act. It simply brings the air pilots' organization within the terms of the Railway Labor Act."

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No. 509.

In the Supreme Court of the United States

October Term, 1952.

TRANSCONTINENTAL & WESTERN AIR, INC., *Petitioner*,

vs.

JOSEPH H. KOPPAL, *Respondent*.

RESPONDENT'S BRIEF.

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INDEX.

	PAGE
Opinion below	1
Jurisdiction	2
Statement of the case	3
Argument	5
I. State law does not apply to an action for wrongful discharge arising out of an employment relationship covered by the Railway Labor Act within the field of matters regulated by the Act	5
II. The decisions of this Court in Moore v. Illinois Central R. Co. and Slocum v. Delaware, L. & W. R. Co., preclude the application of state law requiring an employee to seek adjustment of a wrongful discharge controversy with a carrier regulated by the Railway Labor Act, as a prerequisite to a suit for damages for wrongful discharge	8
Conclusion	12

Table of Cases Cited.

Erie R. Co. v. Tompkins, 304 U. S. 64 5
Harrison v. Pullman Co., 8 Cir., 68 Fed. 2d 826 7
McComb v. Texas N. O. R. Co., 183 S. W. 2d 716 ..... 6, 10
McComb v. Texas N. O. R. Co., 178 S. W. 2d 729 11
Moore v. Illinois Central R. Co., 312 U. S. 630 ..... 6, 8
Order of R. Conductors v. Pitney, 326 U. S. 561 11
Reed v. St. Louis S. W. R. Co., 95 S. W. 2d 887 ..... 7, 11
Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 ..... 6, 8, 11

Statutes Cited.

28 U. S. C. A., Sec. 1652 5
45 U. S. C. A., Sec. 151 et seq. 10

Other Authorities.

14 Am. Jur. 303, Courts, Sec. 90 5

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RESPONDENT'S BRIEF.

No. 509.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (164-180)* is reported at 199 F. 2d 117. The opinion of the United States District Court for the Western District of Missouri, Western Division (124-130) was not reported.

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*Unless otherwise stated, references in parentheses are to pages of the record, and italics are for emphasis and are ours.

JURISDICTION.

The jurisdiction of this Court was invoked under 28 U. S. C. A. Sec. 1254 (1), and petition for writ of certiorari to the Court of Appeals granted February 9, 1953 (73 S. Ct. 504-Adv. Ed., March 1, 1953), limited, however, to questions 1 and 2 presented by the petition.

STATEMENT OF THE CASE.

Petitioner's statement of the case is accurate and adequate insofar as the history of the cause is concerned, but is remarkably deficient in references to the evidence in the record upon which respondent relied for his cause of action, and which motivated the District Court to submit his case to the jury, and upon which the jury based its verdict in his favor.

Although the facts of this cause are not in issue before this Court, it would be unfair to allow petitioner's statement to stand without a brief supplement.

Respondent was a married man and responsible for the support of his wife and two children (91, 93, 94). After his discharge by petitioner he was unable to secure employment in the air transport industry in Kansas City and moved to California, from where he traveled for the trial of this case (93, 98). There was substantial evidence that respondent was ill and unable to work on November 8, 1950, and that he did not abuse the sick leave provisions of the collective bargaining agreement in not reporting for work on that day (91, 92, 93, 94, 95, 136). There was substantial evidence that respondent was ill on November 9th, 1950, although he reported for work on that day (92, 96, 136). There was substantial evidence that the meeting between respondent, DeMattia and Wilson on November 8, 1950, in respondent's home was not prearranged (91, 92, 94). There was substantial evidence that respondent did not receive a fair hearing (96, 97, 136, 137, 138), and that he did not voluntarily resign, but was summarily discharged (98, 138). Respondent had seven years seniority with petitioner, had a good employment and promotion record (24-25). Petitioner

had no published policy regarding sick leave (26-29, 80), and no standards of rule violation serious enough to require discharge, other than for "just cause." (48, 68.)

The record does not fairly represent all of the evidence favorable to respondent, since his appeal to the court below was presented on the theory that sufficiency of the evidence was not in issue due to the decision of the District Court (120-121, 124-130), and because petitioner did not raise the point during the trial (101, 102).

ARGUMENT.

I.

State law does not apply to an action for wrongful discharge arising out of an employment relationship covered by the Railway Labor Act within the field of matters regulated by the Act.

Respondent submits that the question of application of state law in this case is squarely answered by the Federal Rules of Decision Act, 28 U.S.C.A., Sec. 1652, enacted by the First Congress of the United States, and which provides:

> "The laws of the several states, except where the constitutions and treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

In *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, this Court held that judicial decisions, as well as statutory law are "the laws of the several states" within the meaning of the Rules of Decisions Act, but did not hold that state decisions prevail over decisions of this Court, interpreting laws of the United States, as urged by petitioner.

The question of applicability of state decisions in the field of Federal law is treated as settled in 14 Am. Jur., Courts, Sec. 90, p. 303:

> "It is, of course, clear that where the question is one of Federal law, the Federal Courts are not bound by the decision of State Courts."

Congress has seen fit to comprehensively control every phase of the relationship between employer and employee in the railroad industry. The provisions of the Railway Labor Act itself, and the decisions of this Court can leave no question concerning the intent of Congress to include within its regulation the wrongful discharge of employees in the railroad industry. The question as to the nature and effect of the provisions of the Railway Labor Act upon suit for wrongful discharge was decided by this Court in the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630 and affirmed by the court in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S., 239, and renders state decisions to the contrary inapplicable.

The Supreme Court of Texas in the case of *Texas and N. O. R. Co.* v. *McCombs*, 183 S. W. 2d 716 had no difficulty in determining this question, and overruled a long line of Texas decisions holding that an employee was required to exhaust his contract remedies with the railroad as a prerequisite to suit for wrongful discharge, upon the authority of *Moore* v. *Illinois Central R. Co.* (*supra*).

In this case the petitioner and the collective bargaining representative recognized the controlling authority of the Railway Labor Act over the entire employment relationship in the preamble to the agreement (31) and also recognized it in the body of the agreement (72) where it is provided that nothing in the contract shall be construed to limit, restrict, or abridge rights or privileges accorded under the provisions of the Railway Labor Act, as amended.

The administrative remedy provisions for wrongful discharge in the agreement (63-73) were not independently arrived at through a meeting of minds between the parties, but conform directly to the requirements of the Act. (45 U. S. C. A. Sec. 184.)

The nature and effect of such provisions in a contract made under the Railway Labor Act are therefore not questions of Missouri law but questions arising under an Act of Congress under which federal law and federal decisions are controlling under the Federal Rules of Decision Act. (*supra*).

This Court has held that an employee subject to the provisions of the Railway Labor Act has the right to sue a carrier for wrongful discharge, without first exhausting his remedies under the Act and under the applicable collective bargaining agreement entered into under the Act. Congress has not deemed it necessary to prescribe a special statute of limitations, nor to legislate concerning other matters of substantive law pertaining to wrongful discharge actions arising in the railroad industry. Such a status is not unique and merely leaves the litigants subject to the substantive law of the several states in those areas in which Congress has not seen fit to act.

The cases of *Reed* v. *St. Louis S. W. R. Co.*, 95 S. W. 2d 887, and *Harrison* v. *Pullman Co.*, 68 F. 2d 826, here relied upon by petitioner, were respectively held to be inapplicable and no longer reflective of the law by the court below. These cases were originally decided without regard to the Railway Labor Act and its construction and interpretation by this Court. State laws and state decisions have never taken precedence over the decisions of federal courts in the field of federal law. Where, as here, the entire employment relationship is regulated by Congress, state law cannot be said to be an exception to the rule.

Petitioner argues that the language of Sec. 184 of the Act compels respondent to exhaust his remedies with the carrier under the agreement before instituting suit. In

so doing petitioner admits the existence of a question of interpretation of a federal law in which federal decisions control.

II.

The decisions of this Court in *Moore* v. *Illinois Central R. Co.* and *Slocum* v. *Delaware, L. & W. R. Co.* preclude the application of state law requiring an employee to seek adjustment of a wrongful discharge controversy with a carrier regulated by the Railway Labor Act, as a prerequisite to a suit for damages for wrongful discharge.

In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, two questions were decided by the Court. First, the Court decided that the Mississippi Supreme Court's interpretation of a Mississippi statute of limitations was binding upon the courts of the United States. Secondly, the court decided that it was not necessary, as a prerequisite to a suit at law for wrongful discharge, for an employee to first exhaust his administrative remedies under the Railway Labor Act or with the carrier under the collective bargaining agreement.

Petitioner urges the Court, as does the dissenting opinion of the court below, that the Moore decision stands only for the proposition that the Railroad Labor Act affords an alternate administrative remedy before the Adjustment Board, in addition to an action at law, for wrongful discharge. This is not the case, for the carrier in the Moore case squarely put before the court both the question of failure to exhaust administrative remedies under the Act and failure to exhaust administrative remedies under the agreement. On page 634 of the opinion the Court said:

> "But respondent says that there is another reason why the judgment in its favor should be sustained.

> This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act."

The court immediately answered the question thus posed by saying:

> "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

It is at this point that both the petitioner and the dissenting opinion stop in their analysis of the Moore case. However, this Court went on to say (l. c. 635):

> "And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the trainmen and the railroad—a provision authorizing Moore to submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officers of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was unjust."

The second reason advanced by the carrier in support of its argument that Moore's suit had been prematurely brought, was also answered adversely to the carrier by the court on page 636 of the opinion:

> "The District Court and the Circuit Court of Appeals properly decided that the petitioner was not required by the Railway Labor Act to seek adjustment of his

controversy with the railroad as a prerequisite to suit for wrongful discharge."

The statutory language to which the railroad referred in connection with its contention regarding the right of Moore to appeal to its higher operating officers, was the same identical language (45 U. S. C. A., Sec. 153 (i)) incorporated into 45 U. S. C. A., Sec. 184, pertaining to carriers by air, and which petitioner argues at great length to be compulsory in its effect and to invite the application of the decision of *Reed* v. *St. Louis S. W. R. Co.* (*supra*). This Court rejected the contention of the railroad in the Moore case, as did the court below in this case, holding that the original purpose of the Railway Labor Act in providing machinery for the settlement of disputes was not based upon a theory of legal compulsion, and that an employee was not required by the Act to appeal to the highest operating officer of the carrier before instituting a suit for wrongful discharge.

It would appear that petitioner is seeking to reverse the decision of this Court in the Moore case, because it is in conflict with the decision of a Missouri Court of Appeals decision, whereas in fact, and as correctly held by the court below, *Reed* v. *St. Louis S. & W. R. Co.* (*supra*), has been inapplicable to agreements entered into under the Railway Labor Act since the decision of this Court in the Moore case.

It is worthwhile noting in the report of the Moore case in 85 L. Ed. 1089, that both of the cases relied upon by petitioner in this cause were cited to the Court in the brief of the railroad under the point that Moore's suit had been prematurely brought (l. c. 1090).

Respondent submits that the decision of the Supreme Court of Texas in the case of *McComb* v. *Texas N. O. R.*

Co., 183 S. W. 2d 716, is entitled to great weight in this case, because in addition to following the decision of this Court in the Moore case, it overruled, upon the authority of the Moore case, a number of Texas decisions holding that the administrative remedies provided in the agreement must be exhausted prior to suit for wrongful discharge. We also cite to the Court the decision of the Texas Court of Appeals in the same case, *McComb* v. *Texas N. O. R. Co.*, 178 S. W. 2d 729.

The Texas decisions overruled by the McComb case were also cases relied upon by the St. Louis Court of Appeals in *Reed* v. *St. Louis S. W. R. Co.*, 95 S. W. 2d 887, 889, and were cited by this Court by the carrier in the Moore case, 85 L. Ed. 1089, 1090.

The general principle of the Moore case here in issue was affirmed in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, although an action for wrongful discharge was not involved. In the Slocum case the state courts of New York took jurisdiction, under a state declaratory judgment statute, of a jurisdictional dispute involving a carrier and two unions and involving agreements entered into by them under the Railway Labor Act. This Court had previously held in *Order of R. Conductors* v. *Pitney*, 326 U. S. 561, that such a dispute and interpretation of contracts properly fell within the jurisdiction of the Adjustment Board, which jurisdiction could not be invaded by the courts. The Slocum decision held state courts were likewise bound to follow the interpretation of a Federal Statute by this Court.

The situation now before the Court in this cause is not unlike the Slocum case, in that petitioner is urging the Court that state law and state decisions prevail over the decisions of this Court interpreting the Railway Labor Act; and for the same reasons as stated in the Slocum case, the opinion of the court below should be affirmed.

Conclusion.

For the foregoing reasons the judgment of the United States Court of Appeals for the Eighth Circuit in this cause should be affirmed.

Respectfully submitted,

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